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## The Vaguer Sanctions of Conscience: A Constitutional and Policy Analysis of Nebraska Medical Tort Reform 1976–1987

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# The Vaguer Sanctions of Conscience: A Constitutional and Policy Analysis of Nebraska Medical Tort Reform 1976-1987

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## I. INTRODUCTION

An inherent strength of democracy is that an elected legislature is rapidly sensitive to changes in the mood of the electorate. Yesterday's burning issue is tomorrow's forgotten topic. Last year's evil is next year's virtue. Paradoxically, this strength is also a weakness. The instinct that balances the scales of justice ultimately is little different from that which animates the rope-bearing mob.

Holmes' bad man<sup>1</sup> is aware of legislative responsiveness. He perverts it to his gain. The open door of the concerned representative is filled by the lobbyist. Paid advertisements fill the free press. The fire soon sweeps through the electorate and something must be done. Motivated by the best of intentions, the legislature becomes the disgruntled purchaser of a manufactured crisis. The electors themselves are the final victims.

The crisis is tort reform. The legislature is our own. Beginning in the 1970s, insurers on both coasts and later, nationwide, sharply increased premiums for certain lines of insurance. The initial manifestation was felt in medical malpractice insurance. The impact on physicians was real and their concern justified. Premiums in this line almost doubled from 1974 to 1977.<sup>2</sup> For purposes of later discussions, the reader should note that these were late- and post-Vietnam years of poor investment return, and that a temporary abatement in the "crisis" followed with the high inflation years of the late 1970s and early '80s.

A massive insurance industry campaign pointed to the legal system, not the medical industry or the insurance industry itself, as the source of the problem. The majority of jurisdictions took action to correct the perceived problem. Nebraska responded in 1976 with comprehensive legislation that placed conditions on access to courts by most medical malpractice claimants,<sup>3</sup> limited the absolute amount of damages recoverable,<sup>4</sup> and created various state primary and excess

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1. If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

2. Sloan, *State Responses to the Malpractice Insurance Crisis of the 1970s: An Empirical Assessment*, 9 J. HEALTH POL. POL'Y & LAW 629 (1985).

3. The Nebraska Hospital-Medical Liability Act, L.B. 434, § 40, 79th Leg., 1st Sess., 1976 Neb. Laws 151 (codified as amended at NEB. REV. STAT. §§ 44-2801 to -2855 (1984)) created a medical review panel as a precondition to bringing suit. Although the system purportedly was elective, the predictable reality was that most patients remained blissfully unaware of the consequences of their "election." See NEB. REV. STAT. § 44-2821(2) (1984) (prior to 1984 amendment).

4. L.B. 434, § 32(2), 79th Leg., 1st Sess., 1976 Neb. Laws 160 (codified at NEB. REV.

risk underwriting associations.<sup>5</sup>

Yet this was not enough. The Reagan presidency brought massive deficit spending and surface prosperity, causing interest rates to fall. A new crisis was born, fueled by a \$6.5 million insurance industry campaign and record industry investment profits. The lawyers were driving doctors, school sports, and municipal services out of business, even the clergy was feeling the pinch.<sup>6</sup> Something had to be done.

The industry conveniently offered L.B. 425 as a solution. This bill was considerably more far reaching than the 1976 legislation. An absolute limit was proposed on all noneconomic damages,<sup>7</sup> the collateral source rule was to be abolished,<sup>8</sup> and joint and several liability was to be replaced with several liability.<sup>9</sup>

Fortunately, the bill was rejected. However, the rejection was close and the controversy is likely to be repeated. More importantly, the majority of the 1976 legislation remains in place and the justification for its passage has long since passed.

This comment examines the 1976 legislation and the proposed 1987 legislation from a constitutional and a policy base. Part II discusses the legislation itself. Part III discusses questions that are raised under the state and federal constitutions. Finally, Part IV discusses the insurance industry in Nebraska to determine whether a true crisis exists.

Some aspects of L.B. 425 reach far beyond medical tort reform and

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STAT. § 44-2825(1) (1984)), limited total recovery to \$500,000, regardless of the seriousness of injury, for patients who had "elected" to be bound by the Act.

5. L.B. 434, § 29, 79th Leg., 1st Sess., 1976 Neb. Laws 158 (codified at NEB. REV. STAT. § 44-2829 (1984)), created the excess liability fund, a carrier for malpractice coverage in excess of \$100,000. In addition, § 37(2), 1976 Neb. Laws 164 (codified at NEB. REV. STAT. § 44-2837 (1984)), created the Residual Malpractice Authority. The authority was authorized to write primary coverage should commercial coverage become unavailable for any class of health care providers.
6. *The Manufactured Crisis*, 51 CONSUMER REP. 544, 545 (1986), shows four of the full-page ads issued by the Insurance Information Institute, a \$6.5 million insurer-funded entity. The ads are headlined, respectively—"EVEN THE CLERGY CAN'T ESCAPE THE LAWSUIT CRISIS," illustrated with a frowning clergyman; "INSURANCE IS GETTING KILLED IN SELF-DEFENSE," illustrated with an intent jury; "THE LAWSUIT CRISIS IS BAD FOR BABIES," illustrated with a newborn in a physician's hand; and "THE LAWSUIT CRISIS IS PENALIZING SCHOOL SPORTS," illustrated with a young football player whose head is lowered. All end with the statement, "The Lawsuit Crisis. We all pay the price." The \$6.5 million added to the price by the campaign is not mentioned.
7. L.B. 425, § 27, 90th Leg., 1st Sess. (1987) would have placed an absolute limit of \$250,000 on all noneconomic damages in all civil actions.
8. L.B. 425, § 12, 90th Leg., 1st Sess. (1987) required the trier of fact to consider not only existing collateral payments, but payments "which are substantially certain to be paid."
9. L.B. 425, § 32, 90th Leg., 1st Sess. (1987). Each tortfeasor would have been assigned liability on a percentage basis. The operation would have shifted the loss from insolvent tortfeasors to the plaintiff, rather than to co-defendants as under present law.

into unrelated areas, such as corporate director and municipal liability. These areas are generally beyond the scope of this comment. However, many of these reforms involve the same modifications in tort law. The constitutional and policy arguments share a common base and the comment may be instructive for the reader concerned with these areas.

## II. THE LEGISLATION

### A. Legislative Purposes, Goals, and Findings

The 1976 legislation expressed concern with the cost, quality and availability of health care, and the availability of malpractice insurance. One goal was the establishment of "prompt and efficient methods for eliminating the expense as well as the useless expenditure of time of physicians and courts in nonmeritorious claims and for efficiently resolving meritorious claims."<sup>10</sup>

The 1976 Legislature also expressed its intent to provide an alternate means of dispute resolution. The intent was backed by a poorly worded finding that "too large a percentage of the cost of malpractice insurance is received by individuals other than the injured party."<sup>11</sup> Thus, a dispute resolution system was provided to "improve the availability of medical care, improve its quality, and to reduce the cost thereof, and to insure the availability of malpractice insurance coverage at reasonable rates."<sup>12</sup>

The 1987 legislation had multiple purposes. The bill began with a finding and declaration that "in order to assure the just distribution of the cost and risk of injury and to fairly assign fault to deter future injury, an equitable civil litigation process must be preserved."<sup>13</sup>

Second, L.B. 425 continued with a finding of relevance to medical torts. "The threat of excessive litigation and awards discourages physicians and other health providers from initiating or continuing their practices or offering needed services to the public and contributes to the rising costs and limitations of consumer health care."<sup>14</sup>

Finally, the Legislature declared that its intent was "to protect and preserve a fair, equitable, and responsible civil litigation process for all parties to assure the availability of adequate and appropriate compensation for persons injured through the fault of others."<sup>15</sup>

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10. NEB. REV. STAT. § 44-2801(1) (1984).

11. *Id.* Presumably, the legislature meant that too large a percentage of benefits paid pursuant to malpractice insurance policies are received by individuals other than the injured party. The cost of insurance is paid by the insured and received by the insurer.

12. *Id.*

13. L.B. 425, § 1(1), 90th Leg., 1st Sess. (1987).

14. *Id.* § 1(4).

15. *Id.* § 1(5).

## B. Persons Affected by the 1976 Legislation

The 1976 legislation affected two classes—health care providers and patients. A health care provider was defined as a physician or nurse anesthetist<sup>16</sup> who was licensed to practice in Nebraska,<sup>17</sup> whether individually or in corporate form.<sup>18</sup> Hospitals also were protected.<sup>19</sup> Podiatrists, chiropractors, dentists, optometrists, osteopaths, pharmacists, audiologists, psychologists, and marriage or family counselors are excluded.<sup>20</sup>

The second qualification for protection under the Act was proof of insurance. A health care provider must obtain malpractice insurance coverage of \$100,000 per occurrence and \$300,000 per year aggregate liability. For hospitals, the requirement is \$1 million dollars per year. Proof of such insurance must be filed with the Nebraska Director of Insurance.<sup>21</sup> Finally, the provider must participate in a state-sponsored excess coverage program.<sup>22</sup>

The final requirement for a provider to qualify for the protection of the Act was a notice requirement. The provider was required to post, in the waiting room or other "suitable location" that "[name of provider] has qualified under the provisions of the Nebraska Hospital-Medical Liability Act. Patients will be subject to the terms and provisions of that Act unless they file a refusal to be bound by the Act with the Director of Insurance of the State of Nebraska."<sup>23</sup> Under regulations promulgated by the State Department of Insurance, the notice is to be eight and one-half inches by eleven inches.<sup>24</sup> Although the Act is identified by title, legislative bill (L.B.) number, and legislature, further identification is expressly optional.<sup>25</sup>

A patient is defined as a natural person who "receives or should have received health care from a licensed health care provider"<sup>26</sup>

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16. NEB. REV. STAT. § 44-2803(1)(a), (b) (1984).

17. *Id.* § 44-2803(2).

18. *Id.* § 44-2803(1)(d).

19. *Id.*

20. *Id.* § 44-2804 (limiting physician to "a person with an unlimited license to practice medicine in this state pursuant to sections 71-1,102 to 71-1,107.14"). Each of the excluded professions is regulated under other sections of chapter 71. Finally, the provider must participate in a state-sponsored excess coverage program.

21. *Id.* § 44-2824(1)(a) (1984). The 1986 legislation changed this to \$200,000 per occurrence. *Id.* § 44-2824(1)(a) (Supp. 1987).

22. *See infra* notes 58-64 and accompanying text.

23. NEB. REV. STAT. § 44-2821(4) (1984); NEB. ADMIN. R. & REGS. tit. 210, ch. 32, 005-007 (1985).

24. NEB. ADMIN. R. & REGS. tit. 210, ch. 32, 005-007 (1985).

25. *Id.* The regulations also provide a sample sign that states the patient must "notify the . . . health care provider of the election as soon as is reasonable under the circumstances that such patient has so elected." *Id.*

26. NEB. REV. STAT. § 44-2805 (1984).

under an express or implied contract.<sup>27</sup> A patient may opt out of the Act by filing a notice of refusal to be bound with the State Director of Insurance and notifying the health care provider "as soon as is reasonable under the circumstances."<sup>28</sup> The election requires renewal every two years to remain in effect.<sup>29</sup>

In 1986, the amount of insurance required for non-hospital providers to qualify was modified. Such a provider now is required to carry \$200,000 per occurrence and \$600,000 per year aggregate coverage.<sup>30</sup>

### C. Absolute Limits on Damages

The 1976 legislation created an absolute limit of \$500,000 on recovery of damages for parties under the Act.<sup>31</sup> The provider was liable only for the first \$100,000, with the balance to be paid out of the Nebraska Excess Liability Fund.<sup>32</sup> The 1984 revision raised the maximum amount recoverable to \$1 million for claims after December 31, 1984.<sup>33</sup>

L.B. 425 would have added an absolute limit of \$250,000 for noneconomic damages awarded to a single plaintiff, regardless of the number of defendants.<sup>34</sup> Noneconomic damages were defined as "subjective, nonmonetary losses, including, but not limited to, pain, suffering, inconvenience, mental anguish and suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, fear of loss, illness, or injury, and the impairment of the quality of life."<sup>35</sup> The limitation was not to be disclosed to the jury,<sup>36</sup> although the jury would have been required to make a separate finding on the amount of noneconomic damages.<sup>37</sup> Finally, the \$250,000 limit was subject to all other limitations, such as the \$1 million limit on awards under the existing Hospital-Medical Liability Act.

### D. Collateral Source Modification

Both the 1976 and the proposed 1987 legislation contained modifications of the collateral source rule.<sup>38</sup> The 1976 legislation contained a

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27. *Id.* Since 1963, Nebraska has barred recovery for negligence if the care was rendered in good faith on an emergency or rescue basis by a member of a volunteer fire department, first aid, or emergency squad. *Id.* § 35-108.

28. *Id.* § 44-2821(2).

29. *Id.* § 44-2821(3).

30. *Id.* § 44-2824(1)(a) (Supp. 1987).

31. *Id.* § 44-2825(1) (1984)(prior to 1984 amendment).

32. See *infra* notes 58-64 and accompanying text.

33. NEB. REV. STAT. § 44-2825(1) (1984).

34. L.B. 425, § 27, 90th Leg., 1st Sess. (1987).

35. *Id.* § 26(2).

36. *Id.* § 29.

37. *Id.* § 28.

38. The collateral source rule provides that a tortfeasor is liable for all damages prox-

very limited modification of the rule. When an element of damages was the cost of medical care, custodial care, or rehabilitation services, a deduction from the final verdict was allowed in the amount of payments made by any nonrefundable medical insurance, less the amount of premiums paid for the insurance.<sup>39</sup> Nonrefundable benefits were "those payments not required to be refunded in event of recovery of damages."<sup>40</sup> Thus no deduction was required, if the recovery was subrogated to the insurance carrier. Further, even if a deduction was called for, the amount was inadmissible and was not to be brought to the attention of the jury. The parties could either stipulate to the amounts deducted or have this figure determined by the court.<sup>41</sup>

By contrast, L.B. 425 attempted to completely abrogate the collateral source rule:

[I]n all civil actions, regardless of the theory of liability under which they are brought, the court shall allow the admission into evidence of proof of collateral source payments which have already been made or which are substantially certain to be made to the claimant. . . . Proof of such payments shall be considered by the trier of fact in arriving at the amount of any award and shall be considered by the court in reviewing awards made for excessiveness.<sup>42</sup>

Further, L.B. 425 specifically provided: "Nothing . . . shall interfere with any right of subrogation nor shall it preclude the collection of the same from any defendant."<sup>43</sup> The only protection offered to plaintiffs was that the trier of fact was again allowed to hear and consider evidence of insurance premiums paid by the plaintiff.<sup>44</sup>

#### E. Statute of Limitations Modification

The 1976 legislation provided a two-year statute of limitation for actions under the Act.<sup>45</sup> However, the Act also provided a discovery rule. Consistent with judicial adoption of the discovery rule in *Spath v. Morrow*,<sup>46</sup> the Act provided that, if the malpractice "is not discovered and could not be discovered within such two-year period, the action may be commenced within one year from the date of the

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imately caused by the tort, and may not claim a reduction in liability for the tort because the plaintiff was able to recover part of the loss from outside sources. RESTATEMENT (SECOND) OF TORTS § 920A (1979).

If abrogation of the rule is applied in a non-discriminatory manner, and double deductions by subrogated sources prevented, there would seem to be few problems with its elimination. The Restatement itself notes that "the rule is of common law origin and can be changed by statute." *Id.* comment d.

39. NEB. REV. STAT. § 44-2819(1) (1984).

40. *Id.* § 44-2817.

41. *Id.* § 44-2819(1).

42. L.B. 425, § 12(1), 90th Leg., 1st Sess. (1987).

43. *Id.*

44. *Id.* § 12(3).

45. NEB. REV. STAT. § 44-2828 (1984).

46. 174 Neb. 38, 115 N.W.2d 581 (1962).



discovery or the discovery of facts which would reasonably lead to such discovery, whichever is earlier."<sup>47</sup> Finally, the Act provided that "[i]n no event may any action be commenced to recover damages for malpractice or professional negligence . . . more than six years after the date [of the malpractice]."<sup>48</sup>

The interpretation of the six-year limit was affected by *Sacchi v. Blodig*.<sup>49</sup> *Sacchi* was an action for malpractice that occurred in 1967 and 1968, well before the commencement of the Act. The plaintiff was under a disability until 1979 and filed suit in 1980.<sup>50</sup> The court held an identically worded ten-year bar for malpractice outside of the Act was a limit on the time the statute would be tolled for discovery and not an absolute limit of time to bring the action.<sup>51</sup> Thus, those not under a disability were barred after ten years, regardless of whether or not they had discovered the injury. Those under a disability had the statute tolled for the entire time of their disability, even if the disability lasted more than ten years.

Drafters of the 1984 revisions obtained a State Attorney General's Opinion that the six-year limitation under the Act also would not operate to bar claims by those under disabilities. The opinion further stated that the six-year limit under the Act might raise equal protection questions, when compared to the ten-year limit outside of the Act.<sup>52</sup> Thus, the drafters expanded the period to ten years under the Act, as well.<sup>53</sup>

A last feature of the 1976 legislation was that the filing of a request for review tolled "the applicable statute of limitations for a period of 90 days following the issuance of the opinion by the medical review panel."<sup>54</sup> In *Jacobs v. Goetowski*,<sup>55</sup> the court held the ninety days was added to the two-year limit. A contrary construction, which would have required suit within ninety days from the issuance of the opinion, was rejected over a dissent.<sup>56</sup>

L.B. 425 would have attempted to overrule the *Sacchi* holding. First, the knowledge of a custodial parent or guardian would have been imputed to a minor or an insane person and commenced the running of the statute. Second, the ten-year limitation period specifically was made applicable to all persons, regardless of minority or other

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47. NEB. REV. STAT. § 44-2828 (1984).

48. *Id.* (prior to 1984 amendment).

49. 215 Neb. 817, 341 N.W.2d 326 (1983).

50. *Id.* at 818, 341 N.W.2d at 328.

51. *Id.* at 822-24, 341 N.W.2d at 330-31.

52. 1983-84 Op. Neb. Att'y Gen. 199 (1983).

53. NEB. REV. STAT. § 44-2828 (1984).

54. *Id.* § 44-2844.

55. 221 Neb. 281, 376 N.W.2d 773 (1985).

56. *Id.* at 293, 376 N.W.2d at 780 (Krivosha, C.J., dissenting).

disability.<sup>57</sup>

#### F. Joint and Several Liability Modification

The 1976 legislation modified traditional joint and several liability by shifting all losses in excess of \$100,000 to the Nebraska Excess Liability Fund, which was established by a surcharge on qualified providers. The surcharge could not exceed the lesser of fifty percent of the provider's premium for the first \$100,000 or the amount necessary to maintain the fund at approximately \$5 million.<sup>58</sup>

The fund was a mandatory participant in all cases in which settlement offers of \$100,000 were rejected by the plaintiff. To involve the fund, the plaintiff was required to file a petition describing the amounts sought from the fund in the court with jurisdiction. If jurisdiction had not been established yet, the petition was to be filed in a state district court.<sup>59</sup> Copies of the petition were to be served on the Director of Insurance, the health care provider, and the health care provider's insurer, all of whom were given rights to intervene.<sup>60</sup> If no settlement could be reached, all of the parties would present evidence to the judge, who would determine the amount of the claimant's damages in excess of \$100,000. A jury trial apparently was not contemplated.<sup>61</sup>

The 1984 revisions made clear that plaintiff's damages were an issue to be determined at trial.<sup>62</sup> A final change made by the 1984 revisions dealt with the reserve level of the Excess Liability Fund. Rather than a stipulated level, the fund was to be maintained at "a level which is sufficient to pay all anticipated claims for the next year and maintain an adequate reserve for future claims."<sup>63</sup>

The 1986 legislation raised the amount necessary to trigger the Fund's mandatory participation to \$200,000.<sup>64</sup> This is consistent with changing the amount of insurance required to be carried by qualified providers to \$200,000.

The 1976 legislation also codified one portion of traditional joint and several liability. The RESTATEMENT (SECOND) OF TORTS provides that an advance payment made by a defendant is credited against his

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57. L.B. 425, 90th Leg., 1st Sess., § 15 (1987). Parts of *Sacchi* may have been effectively overruled by *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982), which held that no awareness of injury was required to commence the running of the statute.

58. NEB. REV. STAT. § 44-2829(2) (1984). The amount reserved was specified as approximately \$5 million. *Id.* § 44-2830 (prior to 1984 amendment).

59. *Id.* § 44-2833(1)-(2) (prior to 1984 amendment).

60. *Id.* § 44-2833(3).

61. L.B. 434, § 33(6)-(7), 79th Leg., 1st Sess., 1976 NEB. LAWS 151.

62. NEB. REV. STAT. § 44-2823(6) (1984).

63. *Id.* § 44-2830.

64. NEB. REV. STAT. § 44-2832 (Supp. 1986).

overall liability.<sup>65</sup> The 1976 legislation codified this: "[T]he advance payment shall inure to the exclusive benefit of the defendant making the payment."<sup>66</sup>

In contrast, L.B. 425 attempted to repeal joint and several liability. "Each defendant shall be liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against the defendant for that amount."<sup>67</sup> In addition, the language incorporating traditional joint and several tort liability was deleted.<sup>68</sup>

The apportionment of fault also could include nonparties, if notice was given 120 days prior to trial. If the nonparty settled prior to trial, fault could be assessed "regardless of whether such person was or could have been named as a party to the suit either as a defendant or plaintiff."<sup>69</sup> Findings of fault against nonparties would not amount to a finding of liability and were not admissible in any other action.<sup>70</sup>

Joint liability would have been preserved in limited cases under L.B. 425. For example, joint liability could be imposed on those "who consciously and deliberately pursue a common plan or design to commit a tortious act or actively take part in it."<sup>71</sup>

### G. Mandatory Pre-Trial Screening

The 1976 legislation established screening by a medical review panel as an absolute precondition to the commencement of a malpractice action against any covered provider.<sup>72</sup> The procedure raised a number of constitutional issues and was upheld in *Prendergast v Nelson*.<sup>73</sup> While a number of issues were not addressed by *Prendergast*, the procedure became voluntary in 1984 and is not discussed in detail here.<sup>74</sup>

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65. RESTATEMENT (SECOND) OF TORTS § 920(A)(1) (1979).

66. NEB. REV. STAT. § 44-2826(2) (1984).

67. L.B. 425, § 32, 90th Leg., 1st Sess. (1987).

68. *Id.* § 17.

69. *Id.* § 33.

70. *Id.* § 34.

71. *Id.* § 35. Similar, though less harsh modifications have been reintroduced in the current Legislature. L.B. 1178, § 3, 90th Leg., 2nd Sess. (1987), provides that "in all civil actions . . . the liability of each party for damages shall be several only and shall not be joint." The bill then softens this modification by exempting concert of action and multiple manufacturers in the chain of manufacture of a product. Finally, the bill allows for reallocation of one defendant's share to the other defendant's should the first defendant's share prove uncollectible. *Id.* § 5.

72. NEB. REV. STAT. § 44-2840(2) (1984)(prior to 1984 amendment).

73. 199 Neb. 97, 256 N.W.2d 657 (1977).

74. NEB. REV. STAT. § 44-2840(4) (1984). The procedure remains a trap for the unwary, since waiver must be exercised by serving the State Director of Insurance with a copy of the petition. *Id.*

An example of a severe constitutional problem not addressed by *Prendergast*

## III. CONSTITUTIONAL ANALYSIS

## A. Special Laws

1. *Historical Background*

The Nebraska Constitution contains a provision that forbids the passage of local or special laws. The provision, enacted with the rest of the current constitution in 1875, provides that "[t]he legislature shall not pass local or special laws in any of the following cases"<sup>75</sup> and continues with a long list of forbidden actions, such as the granting of a divorce, the changing of individuals' names, the empaneling of grand juries, changing the law of descent, and granting charters to railroad companies. After the list of individual subjects, the section concludes by saying, "[i]n all other cases where a general law can be made applicable, no special law shall be enacted."<sup>76</sup>

The section raises several issues. First, it could be argued that the placement of a \$1 million limit on damages and limited collateral source reform under the Nebraska Medical-Hospital Liability Act is legislation in favor of a class, when general legislation could be made applicable. Qualified providers can be viewed as a narrow class who are entitled to the limitation of damages, while other similar professionals, such as psychologists, are not. The class also could be viewed more broadly as including only victims of medical tortfeasors and excluding victims of other tortfeasors.

A second question is presented by L.B. 425. It could be argued that two classes are created. Those with less than \$250,000 of noneconomic damages may recover these damages in full. Those with damages in excess of the statutory figure may not. A similar question is raised by the \$1 million limit of the Medical-Hospital Liability Act.

In order to fully understand the current Nebraska Supreme Court interpretation of section 18, it is necessary to review the historical case law from which such interpretation evolved. An early case provides

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concerns differential treatment of hospital defendants. In any review involving a hospital, the hospital was entitled to select an additional voting member. *Id.* § 44-2841(2)(b). This raised the size of the panel to four and guaranteed the defendants' selection of two panelists, while the plaintiff would select only one. *Id.* § 44-2841(1).

An additional fact not available to the *Prendergast* court is that it is now clear that the panels functioned to reduce damages awarded to the plaintiff. This is seen by analysis of the payment of claims in excess of \$100,000 from the Nebraska Excess Liability Fund. Prior to 1984, when the panels became voluntary, no claims in excess of \$100,000 were paid from the fund. In 1984 six claims were paid; in 1985, four; in 1986, nine; and none in the first quarter of 1987. Memorandum of Author's Interview with Mabel Smith, Administrator of State Medical-Hospital Liability, Nebraska Department of Insurance, July 16, 1987, at 1 [hereinafter Interview].

75. NEB. CONST. art. III, § 18.

76. *Id.*

explicit guidance on exactly what was meant by general and special laws. The 1875 Legislature enacted two laws authorizing school districts to issue bonds. The first authorized the board of trustees of Falls City School District 56 to issue bonds up to the amount of \$20,000.<sup>77</sup> The second authorized district officers of any school district to issue bonds, the amount being regulated by the number of students.<sup>78</sup>

District 56 issued a bond and subsequently defaulted. In *Clegg v. School District No. 56*,<sup>79</sup> a bondholder sued to collect and the District set up the unconstitutionality of the enabling statute as a defense. The court held the statute for District 56 was unconstitutional, stating, "[i]t cannot be doubted that the act in question is a special act. It relates exclusively to school district No. 56, in Richardson county [sic]. None of its provisions apply, or are intended to apply to any other subdivision of the state, or the people thereof."<sup>80</sup>

The court remanded to determine whether issuance of the bond was authorized under "either of the two general acts,"<sup>81</sup> referring to the second bill. From *Clegg*, it is clear an act may not run in favor of specific persons or entities.<sup>82</sup>

In the decade following *Clegg*, the court decided two cases, *State ex rel. Jones v. Graham*<sup>83</sup> and *State ex rel. Selden v. Berka*,<sup>84</sup> which provide further insight into the interpretation of section 18. In both cases, the court considered and rejected constitutional challenges to legislation aimed exclusively at cities of specific classes.<sup>85</sup>

The key factor underlying the decisions in *Graham* and *Berka* appears to have been the open-ended nature of the classification created by the legislation.<sup>86</sup> Each case involved a class of cities fixed in rela-

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77. Act of Feb. 2, 1875, 1875 Neb. Laws 280.

78. Act of Feb. 25, 1875, 1875 Neb. Laws 118.

79. 8 Neb. 178 (1879).

80. *Id.* at 179.

81. *Id.* at 180.

82. The distinction between a special and general law is further clarified in *City of Wahoo v. Dickinson*, 23 Neb. 426, 36 N.W. 813 (1888), in which it is stated: "Our constitution prohibits special legislation as applied to any particular municipal corporation. The Legislature, therefore, cannot, by special act, extend the boundaries of any city or town. This must, therefore, be done by general law . . . under which some contiguous territory may be attached to such city or town." *Id.* at 430, 36 N.W. at 816.

83. 16 Neb. 74, 19 N.W. 470 (1889)(upholding legislation according powers to second class cities only, of which Lincoln was the only one at the time).

84. 20 Neb. 375, 30 N.W. 267 (1886)(change in organic laws of first class cities only upheld).

85. See *State ex rel. Jones v. Graham*, 16 Neb. 74, 77, 19 N.W. 470, 471-472 (1889); *State ex rel. Selden v. Berka*, 20 Neb. 375, 378-379, 30 N.W. 267, 269 (1886). *Berka* involved changes in the organic laws of first-class cities; *Graham* involved changes in the organic laws of second-class cities.

86. See *State ex rel. Jones v. Graham*, 16 Neb. 74, 77, 19 N.W. 470, 471-472 (1889); *State ex rel. Selden v. Berka*, 20 Neb. 375, 378-379, 30 N.W. 267, 269 (1886).

tion to the object of the legislation. As a city changed size, the needs of its municipal government changed. The legislation in both cases recognized that a change in circumstance might involve a change in class. The *Berka* court stressed that the creation of a class was not objectionable as long as something distinguished the class:

Upon this point it seems to be settled that if a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, it is not objectionable as wanting in uniformity of operation.<sup>87</sup>

Other cases clearly demonstrate that a law may be special because it defines a class which is underinclusive in relation to its purpose. In *Althaus v. State*,<sup>88</sup> the Legislature specified one rate of interest for most loans, but set a lower rate for loans using certain listed chattels as collateral. The court struck the legislation. "A lender who charges extortionate interest and accepts security on the chattels enumerated by the legislature may be punished. Another lender who makes a loan on identical terms, except that he includes . . . an article not enumerated in the act . . . goes free."<sup>89</sup> For purposes of the Nebraska Medical-Hospital Liability Act, the relevant question is why professionals enumerated in the Act are protected while others, who may undertake identical acts, are not. Other cases, such as *Low v. Rees Printing Co.*,<sup>90</sup> test the legislative purpose against the means chosen to effectuate that purpose.<sup>91</sup>

By the turn of the twentieth century, the court's test of comparing legislative purpose and means, for determining whether legislation constituted a special law, was phrased in terms sounding remarkably like the modern standard of intermediate scrutiny under an equal protection analysis. In *State ex rel. Dawson County v. Farmers & Merchants Irrigation Co.*,<sup>92</sup> the court stated:

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87. *State ex rel. Selden v. Berka*, 20 Neb. 375, 378-379, 30 N.W. 267, 269 (1886).

88. 94 Neb. 780, 144 N.W. 799 (1913).

89. *Id.* at 782, 144 N.W. at 799. See also *Foxworthy v. City of Hastings*, 23 Neb. 772, 37 N.W. 657 (1888). *Foxworthy* struck a special statute of limitations for negligence which applied only to municipal corporations. The case reasoned that negligence was the same offense regardless of who the defendant was. *Id.* at 778, 37 N.W. at 660.

90. 41 Neb. 127, 59 N.W. 362 (1884).

91. *Id.* at 136, 59 N.W. at 364. In *Low*, the court invalidated a law limiting working hours to eight hours per day, but exempted farm and domestic labor. The court relied on a test comparing legislative purpose and means in reaching its decision, stating, "[t]he argument made in favor of necessity that each day the excess over eight hours should be devoted to rest, recreation, and mental improvement loses much of its force when these very desirable benefits are by the statute itself restricted to certain defined classes of laborers." *Id.* See also *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200, 205, 68 N.W. 375, 377 (1896) (the Legislature "may not arbitrarily and without any possible reason create a class to be affected by legislation").

92. 59 Neb. 1, 80 N.W. 52 (1899).

"If these objects [of the law] are distinguished from others by characteristics evincing a peculiar relation to the legislative purpose, and showing the legislation to be reasonably appropriate to the former and inappropriate to the latter, the objects will be considered . . . to be a class by themselves . . . . But if the characteristics used to distinguish the objects . . . are not germane to the legislative purpose, or . . . if objects with similar characteristics and like relation to the legislative purpose have been excluded from the operation of the law, then . . . legislation is not general, but local, or special."<sup>93</sup>

*Dawson County* clearly indicates the significance of the "underinclusiveness" test in the special law equation.

Throughout the period from 1900 to 1976, the court almost unfailingly applied purpose/means, or underinclusiveness testing in striking down a wide variety of special legislation.<sup>94</sup> For example, during this time period, the court struck down the following: (1) legislation exempting fire chiefs and assistant chiefs from labor regulations applicable to all other firemen (purpose/means);<sup>95</sup> (2) legislation creating differential pay increases for constitutionally defined classes of state employees (purpose/means);<sup>96</sup> and (3) legislation providing a state waiver of sovereign immunity solely in favor of one person (underinclusiveness).<sup>97</sup>

*Continental Insurance Co. v. Smrha*<sup>98</sup> provided the court with yet another opportunity to fine-tune its special law analysis. In *Smrha*, the court applied both purpose/means and underinclusiveness testing

93. *Id.* at 4, 80 N.W. at 53 (quoting *Long Branch v. Sloan*, 49 N.J.L. 356, 362-363, 8 A. 101, 104 (N.J. 1887)). On an almost identical set of facts, the court reaffirmed the holding in 1934. *County of Dawon v. Dawson County Irrigation B.*, 125 Neb. 836, 252 N.W. 320 (1934). See also *Cleland v. Anderson*, 66 Neb. 252, 92 N.W. 306 (1902)(validity of legislative classification depended on "reasons of public policy and substantial differences of situation").

94. See, e.g., *State ex rel. Rogers v. Swanson*, 192 Neb. 125, 219 N.W.2d 726 (1974)(striking statute authorizing public grants for students to attend private institutions on purpose/means and underinclusiveness grounds; public grants to private institutions did not further the legislative purpose of aiding needy students in obtaining a post-high school education and because students attending vocational-type private institutions were ineligible for the public grants); *Continental Ins. Co. v. Smrha*, 131 Neb. 791, 270 N.W. 122 (1936)(striking legislation that provided for tax on fire insurers for the purpose of improving firehouses, on underinclusiveness and purpose/means grounds, because legislation imposed burdens on insurance company, but granted benefits to both insured and uninsured property owners equally); *State v. Scott*, 97 Neb. 681, 97 N.W. 1021, *on reh'g*, 97 Neb. 685, 100 N.W. 812 (1904)(striking statute on underinclusiveness grounds when the legislation authorized county surveyors to act ex-officio as county engineers, but only in towns with a population of more than 50,000 as of the 1900 census, effectively limiting the class to Omaha and Lincoln).

95. *State ex rel. Rea v. Lincoln*, 98 Neb. 634, 636, 154 N.W. 217, 219 (1915)("no good reason" for classes created).

96. *State ex rel. Taylor v. Hall*, 129 Neb. 669, 262 N.W. 835 (1935).

97. *Cox v. State*, 134 Neb. 751, 279 N.W. 482 (1938). In *Cox*, the court noted that "the provisions of the Constitution of this state are mandatory." *Id.* at 756, 279 N.W. at 486.

98. 131 Neb. 791, 270 N.W. 122 (1936).

in striking down legislation designed to improve firehouses by the imposition of a tax solely on the class of fire insurers. Because the legislative object, if achieved, would have conferred equal benefits on owners of insured property and uninsured property alike, the court reasoned "there is no actual difference between the two [classes] in relation to the object to be accomplished."<sup>99</sup>

Purpose/means testing continued as recently as 1974. In *State ex rel. Rogers v. Swanson*,<sup>100</sup> the Legislature authorized public grants for students to attend private institutions. The court held that the statute created two invalid classes, students and institutions. "If the purpose is to aid needy students in securing a post high-school education, the classification is questionable . . . . The training in the private schools is limited to the academic field. A student desiring to enter a private institution specializing in a vocational type training is not eligible."<sup>101</sup>

## 2. Taylor, Prendergast, and Edmunds

This background brings us to two cases on point. In 1974, in response to the insurance crisis, the Legislature passed a shortened two-year statute of limitations for professional negligence.<sup>102</sup> The statute was attacked on a variety of constitutional grounds. However, in *Taylor v. Karrer*, the court rejected the contention that the statute was a special law:

[T]here are substantial reasons for legislative discrimination in regard to this field. We have seen in recent years the growth of malpractice litigation to the point where numerous insurance companies have withdrawn from this field. Insurance rates are practically prohibitive so that many professional people must either remain unprotected or pass the insurance charges along . . . . Public policy dictates diverse legislation in regard to professional services.<sup>103</sup>

It is noteworthy that the statute of limitations in *Taylor* applied to a broad class. The statute, by its terms, applied to "professional malpractice." No attempt was made to delimit this to specific professions.

The second case is *Prendergast v. Nelson*.<sup>104</sup> In *Prendergast*, a three judge plurality upheld the constitutionality of the Medical-Hospital Liability Act, including its \$500,000 limitation. Although the issue of special laws was raised by the appellants in their brief,<sup>105</sup> the majority did not address the contention apart from its equal protection

99. *Id.* at 794, 270 N.W. at 124.

100. 192 Neb. 125, 219 N.W.2d 726 (1974).

101. *Id.* at 138, 219 N.W.2d at 734.

102. NEB. REV. STAT. § 25-222 (1985).

103. 196 Neb. 581, 586, 244 N.W.2d 201, 204 (1976). Appellant argued the statute was a special law, but did not cite *Foxworthy*, a case striking a class statute of limitations as special law. Brief for Appellant at 1, 56-58, *Taylor v. Karrer*, 196 Neb. 581, 244 N.W.2d 201 (1976)(Bound Volume 1402).

104. 199 Neb. 97, 256 N.W.2d 657 (1977).

105. Brief for Appellant at 27-34, *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977)(Bound volume 1438).



analysis. Three dissenters would have stricken large portions of the Act. Justices White and McGowan relied on *Wright v. Central DuPage Hospital*,<sup>106</sup> an Illinois decision that struck down maximum limits on recovery. The dissenters reasoned that the Act "arbitrarily classified, and unreasonably discriminated against, the most seriously injured victims of medical malpractice, but has not limited the recovery of those victims who suffer moderate or minor injuries."<sup>107</sup>

Significantly, in the post-*Prendergast* case, *State v. Edmunds*,<sup>108</sup> the court returned to purpose/means testing in striking down the Nebraska motor vehicle inspection law as a special law. The *Edmunds* court held the elimination of mopeds from the inspection act "was not justified by any significant reduction in danger to the operator or others by reason of faulty equipment as compared with other two-wheeled vehicles not exempted."<sup>109</sup> Again, the class was underinclusive.

### 3. Analysis

The Nebraska Medical-Hospital Liability Act is unquestionably special legislation that would have been stricken by early Nebraska courts. The Act fails because it is underinclusive according to its own purposes. Such underinclusiveness might be permissible under an equal protection analysis. However, the prohibition against special laws is a distinct constitutional restriction of state legislative power. A court that applies equal protection analysis when the issue of special laws is raised abrogates the constitutional responsibilities entrusted to it by the 1875 framers of the Nebraska Constitution and ignores precedent stretching back to that date.

Before further analysis, the threshold issue of election must be addressed. If the statute is in fact a voluntary choice, no party can be heard to complain. Although the State Department of Insurance claims the number of waivers is confidential, the Department admits that only about one to twenty-five persons have exercised this waiver in the ten years of the Act.<sup>110</sup> The low number of "waivers" supports a conclusion that few patients "elect" to proceed under the statute. This conclusion is reinforced by the fact that, since medical malpractice review panels became voluntary, the panels are requested by as few as one in ten claimants.<sup>111</sup>

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106. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

107. *Prendergast v. Nelson*, 199 Neb. 97, 131, 256 N.W.2d 657, 676 (1977)(White, J., dissenting)(quoting *Wright v. Central DuPage Hosp.*, 63 Ill. 2d 313, 325, 347 N.E.2d 736, 741 (1976)).

108. 211 Neb. 380, 318 N.W.2d 859 (1982).

109. *Id.* at 387, 318 N.W.2d at 862.

110. Interview, *supra* note 74.

111. *Id.*

The *Prendergast* dissenters, acting without information regarding the low number of waivers, noted that "[t]he provisions in the act in regard to an election by a claimant are unrealistic and illusory."<sup>112</sup> One of the dissenters went even further, stating:

[T]he reality of the freedom to elect by a claimant was not considered and is not easily demonstrable. Such an election provision ignores the inequality of bargaining power. The very nature of a person's status as a patient places him in a position which makes effective bargaining difficult. A right to elect not to be covered, from which might result a denial of service from the only hospital or physician in a geographical area, can hardly be said to be without implicit coercion.<sup>113</sup>

The election is questionable for another reason as well. The only notice patients receive of their opportunity to elect is an eight and one-half by eleven inch sign that identifies the Act by name and L.B. number, and states that a failure to elect will result in the patients being bound by the terms of the Act "unless they file a refusal to be . . . bound with the Director of Insurance of the State of Nebraska." The sign is small and may be overlooked. Most patients would have no idea of how to exercise their election without consulting an attorney. The sign does not mention the limitation on damages or the existence of review panels.<sup>114</sup> If the party even realizes the existence of a choice, the choice is made without knowledge of the rights given up or the duties imposed. This violates the standard of knowledge of rights and voluntary waiver set forth in *State ex rel. Schaub v. City of Scottsbluff*.<sup>115</sup>

The statute operates to create three classes. First, there are qualified physicians, nurse anesthetists, and hospitals and their agents. Second, there are unqualified physicians, nurse anesthetists, and hospitals and their agents. Finally, there are psychologists, non-anesthetist nurses, psychologists, dentists, osteopaths, chiropractors, pharmacists, optometrists and their employees, as well as other professionals. Only the first class is accorded protection.

The first argument that the Act constitutes special legislation is based on the fact that certain professionals can never qualify for its protection. By way of comparison, consider the statute of limitations

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112. *Prendergast v. Nelson*, 199 Neb. 97, 133, 256 N.W.2d 657, 677 (1977)(Boslaugh, J., dissenting).

113. *Id.* at 132, 256 N.W.2d at 676-77 (White, J., dissenting). Justice White's observation finds support in the facts of the notorious Hahn case. Hahn was a Kearney resident who opted out of the Act and found that care became unavailable. "Mr. Hahn and his wife checked with every doctor in their area. . . . They went to the hospitals. They went to clinics. They tried every medical professional in their area plus some to try to get treatment and were refused." Floor Debate of L.B. 692, 88th Leg., 2nd Sess. 8452 (statement of Sen. Kilgarin).

114. NEB. ADMIN. R. & REGS. tit. 210, ch. 32, 005-007 (1985). See *supra* notes 24-26 and accompanying text.

115. 169 Neb. 525, 530, 100 N.W.2d 202, 206 (1960).

approved in *Taylor*.<sup>116</sup> The statute, by its terms, limited actions for *professional* malpractice. In contrast, the Medical-Hospital Liability Act provides special protections and immunities for a group as specific as nurse anesthetists.<sup>117</sup>

In *Taylor*, the court recognized a crisis that justified special protection accorded to a broad class of people—professionals. The Nebraska Medical-Hospital Liability Act, purporting to address *the same crisis*, provides protections limited to certain members of a distinct, cognizable class. “[W]here a general law can be made applicable, no special law shall be enacted.”<sup>118</sup>

Yet, it may be argued that health care providers are a distinct class within professionals and the Legislature acted pursuant to its motive to continue the availability of health care.<sup>119</sup> However, in doing so, the Legislature has singled out a special type of care for liability protection. Psychologists may act to cure mental disease; a dentist may correct oral disease; an osteopath or chiropractor acts on a different theory of health and wellness altogether. Yet, none are protected despite the fact that all provide health care. To repeat the language from *Low*, “[t]he argument made in favor of the necessity [of available health care] . . . loses much of its force when these very desirable benefits are [limited] to certain defined classes.”<sup>120</sup>

A physician who took an x-ray for back pain would be protected; a chiropractor performing the same activity on the same patient would not be. A psychiatrist treating mental illness with behavioral therapy would be protected; a psychologist using the same methods on the same patient would not be. A physician who removed a wart from a patient's right foot would be protected, the podiatrist who removed one from the left would not be. Thus the Nebraska Medical-Hospital Liability Act creates two, separate classes—“qualified health care providers and all other health care providers,”—and affords protection only to the qualified provider, even though “there is no actual difference between the two in relation to the object to be accomplished.”<sup>121</sup>

Under equal protection analysis, the argument that the Legislature

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116. See *supra* notes 102-03 and accompanying text.

117. As of January 1987, the class of nurse anesthetists was limited to thirty-eight members. Interview, *supra* note 74, at 1. It is difficult to conceive of a more specially limited group short of naming individuals to receive special protection.

118. NEB. CONST. art. III, § 18.

119. See *supra* notes 10-12 and accompanying text.

120. *Low v. Rees Printing Co.*, 41 Neb. 127, 136, 59 N.W. 362, 364 (1894). See also *supra* note 91 and accompanying text.

121. *Continental Ins. Co. v. Smrha*, 131 Neb. 791, 794 n.5, 270 N.W. 122, 125 n.5 (1936). See *supra* notes 98-99 and accompanying text. The exclusion of other health care providers has not gone unnoticed by these groups. Dr. Robert Todd, testifying on L.B. 692, noted the desire of optometrists to be included as a protected group. *Hearings on L.B. 692 Before the Banking, Commerce and Ins. Comm. of the Nebraska Legislature*, 88th Leg., 2nd Sess. 30 (1984).

could act a step at a time would be available. This is not so under special law analysis. "[I]f objects with similar characteristics and like relation have been excluded from the operation of the law, then the . . . legislation [is]. . . special."<sup>122</sup>

The situation is analogous to *Swanson*, in which the court compared the Legislature's purpose of providing access to higher education with its means of limiting grants to certain students and certain colleges.<sup>123</sup>

The special laws argument is weaker when the class is people with damages below and above a certain amount. Here, the object is to provide health care. Providers are said to be leaving or not entering the field because of the cost of insurance; high damage awards contribute directly to high insurance rates. Although these provisions may offend other constitutional provisions, they are not special laws.<sup>124</sup> L.B. 425 and its \$250,000 limit on noneconomic damages operates equally on all who suffer injury. The limitation of the Nebraska Medical-Hospital Liability Act, assuming that it applies to all health care providers and not special listed categories, operates equally on all injured seeking health care. Although this is a narrower class than those affected by L.B. 425, the class seems permissible in light of the purpose of the statute.

In a like manner, collateral source or joint and several liability modifications would seem permissible as long as the class chosen corresponds with the legislative purpose. If both reforms applied to all plaintiffs, no issue could be raised. If the reforms applied to patients of health care providers, broadly defined, both would seem permissible as cost-cutting measures. However, another provision of the Nebraska Constitution provides arguments against absolute limitations of liability. We turn now to this consideration.

## B. Open Courts

### 1. *Historical Background*

The Nebraska Constitution contains an "open courts" provision which states that "[a]ll courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."<sup>125</sup> If interpreted with anything approaching the interpreta-

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122. *State ex rel. Dawson County v. Farmers & Merchants Irrigation Co.*, 59 Neb. 1, 4, 80 N.W. 52, 53 (1899), *see also supra* notes 92-93 and accompanying text.

123. *See supra* notes 100-01 and accompanying text.

124. It should be noted, however, that even this classification has been held to create special laws by courts of other states. *See Wright v. Central DuPage Hosp.*, 63 Ill. 2d 313, 330, 347 N.E.2d 736, 743 (1976).

125. NEB. CONST. art. I, § 13.

tion of early Nebraska courts, this section is a bar to absolute limits on damages.

The argument is simple. Due care is a duty imposed by law. Negligence is a breach of that duty. If injury results, a remedy must be had. If a person is denied recovery when the breach causes more than a certain amount of damage, no remedy is available for the excess damages.

An example is more helpful. In *Florida Patient's Compensation Fund v. Von Stetina*,<sup>126</sup> plaintiff Susan Von Stetina was severely injured in an automobile accident. She was taken to a Florida hospital where she came through surgery "very nicely." Following the surgery, she was placed on a ventilator to assist her breathing. Ventilated patients require injections of a muscle paralyzing drug at forty-five minute intervals to avoid "fighting" the ventilation with involuntary muscle spasms. Although exactly what happened is unclear, the hospital nursing staff neglected the injections for two hours. Von Stetina suffered severe brain damage due to oxygen deprivation, and requires nursing care twenty-four hours a day.<sup>127</sup>

A \$12.47 million malpractice verdict was recovered against the hospital. Florida law shifted liability to a patient compensation fund and allowed a maximum payment of \$100,000 per year from the fund.<sup>128</sup> Nursing and medical expense alone ran to \$188,000 per year. The constitutionality of the statute was raised but not decided, as the case was ultimately remanded for a new trial on evidentiary grounds. It does serve, however, to illustrate the problem.

Under Nebraska law, Von Stetina's maximum award would have been exhausted well before her forty-year life expectancy. A portion of her injury would be a wrong without a remedy. This is contrary to rights guaranteed in our state constitution.

The early cases interpreting the open courts clause fall into three classes and can roughly be described by clauses of the section. First, it is required that "all courts shall be open." Thus, in *State ex rel Goff v. Dodge County*,<sup>129</sup> a tax assessment action, the board proceeded on the complaint of an unnamed witness, had not reduced its findings to writing,<sup>130</sup> and had not considered any evidence. The court issued a writ of mandamus to reverse the board's action. Similarly, the court always has held that agreements to arbitrate do not deprive the plaintiff of access to the courts and that failure to arbitrate may not be main-

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126. 474 So. 2d 783 (Fla. 1985).

127. *Id.* at 785.

128. FLA. STAT. ANN. § 768.54(2)(b) (West 1981). The Florida Legislature subsequently raised the maximum annual payment from the patient compensation fund to one million dollars per year. *Id.* § 768.54(2)(b) (West 1986).

129. 20 Neb. 595, 31 N.W. 117 (1887).

130. *Id.* at 604, 31 N.W. at 121-22.

tained as a defense.<sup>131</sup>

The open courts clause also prohibits a state court from granting a dismissal prior to the presentation of evidence when any issue of fact is present that might bear on the outcome.<sup>132</sup> Further, the court may not dismiss a case prior to its conclusion even after fraud or perjury by a party.<sup>133</sup> The clause also guarantees access to the courts regardless of a claimant's ability or inability to pay fees.<sup>134</sup>

Second, it is required that "every person, for any injury done to him in his lands, goods, person or reputation, shall have a remedy by due course of law."<sup>135</sup> In *State ex rel. Benton v. Elder*<sup>136</sup> a writ of mandamus was granted to compel the Legislature to declare the results of an election, over separation of powers objections. "[I]s there no remedy either on behalf of the persons elected to office or of the public? If not, then the boast of the common law that there is no wrong without remedy is without foundation. Our constitution, however, is broader than the common law."<sup>137</sup>

A significant case for present purposes is *Wilfong v. Omaha & Council Bluffs Street Ry.*<sup>138</sup> In *Wilfong*, plaintiff's nine-year-old decedent was killed by an Omaha streetcar. The plaintiff brought suit against the owner on two causes of action, a statutory wrongful death proceeding and a claim for \$10,000 in pain and suffering damages. The defendant claimed that in accordance with the common law maxim *actio personalis moritur cum persona*,<sup>139</sup> the pain and suffering action died with the decedent. The *Wilfong* court rejected the defense and raised the right to recover in tort to constitutional dimensions:

In a broad sense, the claim for personal injury recognized and created by this constitutional provision, as applied to torts, is "a chose in action." As this constitutional provision neither expressly nor by necessary implication requires the institution of a suit prior to the injured person's death as a condition precedent to recovery . . . nor in any manner conditions the remedy it provides on that fact, the amount that the injured person would recover in his lifetime would amount to damages to his personal estate . . . . Therefore, the cause of action does not abate, but survives.<sup>140</sup>

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- 131. *Hartford Fire Ins. Co. v. Hon*, 66 Neb. 555, 558, 92 N.W. 746, 747 (1902). See also *Phoenix Ins. Co. v. Zlotky*, 66 Neb. 584, 92 N.W. 736 (1902). This is true even when the agreement is procured by collective bargaining. *Rentschler v. Missouri P. R.R.*, 126 Neb. 493, 505, 253 N.W. 694, 700 (1934). *Rentschler* was reaffirmed by *Poppert v. Brotherhood of R.R. Trainmen*, 187 Neb. 297, 189 N.W.2d 469 (1971).
  - 132. *Temple v. Cotton Transfer Co.*, 126 Neb. 287, 290, 253 N.W. 349, 350 (1934).
  - 133. *Fitch v. Martin*, 80 Neb. 60, 61, 113 N.W. 796, 797 (1907).
  - 134. *Douglas County v. Vinsonhale*, 82 Neb. 810, 815, 118 N.W. 1058, 1060-61 (1908).
  - 135. NEB. CONST. art. I, § 13.
  - 136. 31 Neb. 169, 47 N.W. 710 (1891).
  - 137. *Id.* at 185, 47 N.W. at 715 (Maxwell, J., concurring).
  - 138. 129 Neb. 600, 262 N.W. 537 (1935).
  - 139. "A personal right of action dies with the person." BLACK'S LAW DICTIONARY 29 (5th ed. 1979).
  - 140. *Wilfong v. Omaha & C.B. St. Ry.*, 129 Neb. 610, 611, 262 N.W. 537, 542 (1935)(em-

A second significant case in which the court acted to preserve rights guaranteed under this clause is *First Trust Co. v. Smith*.<sup>141</sup> *First Trust* involved an emergency with the Legislature acting to deny a remedy in conflict with this section. The Legislature had enacted three sequential two-year moratoriums on foreclosures, from 1933 to 1935,<sup>142</sup> from 1935 to 1937,<sup>143</sup> and from 1937 to 1939.<sup>144</sup> Since the two subsequent acts were amendatory of the first act, the court construed the question as whether the Legislature could, consistent with this section, act to suspend all foreclosures in the state for six years.<sup>145</sup> To strike the legislation, the court specifically and deliberately used the Nebraska Constitution to reach a result not mandated under federal constitutional law.<sup>146</sup>

As a basis for upholding the acts, it was urged they were passed on an emergency basis.<sup>147</sup> The court considered this irrelevant. "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed on power granted or reserved."<sup>148</sup> The right to a remedy was preserved, "the conclusion is inescapable that the Nebraska moratorium law . . . contravenes the spirit and express terms of sections thirteen and sixteen, Art. I of our Constitution, and is wholly invalidated thereby."<sup>149</sup>

In other cases, this clause also has protected the right to a remedy. In *Smith v. Potter*,<sup>150</sup> the court held that a foreclosure proceeding did not bar the lien rights of non-parties to the foreclosure proceeding and the lien-holders were entitled to a hearing. The statutory foreclosure proceeding could not cut off common law rights.<sup>151</sup>

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phasis added). *Wilfong* was reaffirmed in *Rehn v. Bingaman*, 151 Neb. 196, 36 N.W.2d 856 (1949).

141. 134 Neb. 84, 277 N.W. 762 (1938).

142. Act of Mar. 2, 1933, H.R. 600, ch. 65, 1933 Neb. Laws 301.

143. Act of Feb. 27, 1935, H.R. 1, ch. 41, 1935 Neb. Laws 158.

144. Act of Feb. 16, 1937, L.B. 4, ch. 42, 1937 Neb. Laws 183.

145. *First Trust Co. v. Smith*, 134 Neb. 84, 91-92, 277 N.W. 762, 767 (1938).

146. "[T]he question presented necessitates the consideration of cognate provisions of the state Constitution, some of which are not embraced in the federal Constitution." *Id.* at 102-03, 277 N.W. at 772.

147. Also noteworthy for the present questions is that rather than bowing to a legislative determination, the court carefully scrutinized whether the emergency still existed. "[L]egislation expressly by its terms based upon the . . . state of facts to uphold it, may . . . cease to operate if the emergency ceases or the facts change, even though valid when passed." *Id.* at 94-95, 277 N.W. at 768.

148. *Id.* at 114-115, 277 N.W. at 777.

149. *Id.* at 116, 277 N.W. at 778. Section 16 forbids the impairment of contract. NEB. CONST. art. I, § 16. A mortgage moratorium was held not to impair contracts under the federal Constitution in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). This is another example of the greater protection accorded under the state constitution.

150. 92 Neb. 39, 137 N.W. 854 (1912).

151. *Id.* at 53, 137 N.W. at 859.

The remedy also must be "without . . . delay."<sup>152</sup> In *Shackley v. Homer*,<sup>153</sup> the contest of a will delayed the naming of an executor. It was urged that the plaintiff's foreclosure petition be delayed until the completion of the contest of the will and the naming of an executor. The court found such delay impermissible under this section.<sup>154</sup> The clause also guarantees a speedy criminal trial.<sup>155</sup>

Similarly, in *Appelgate v. Platte Valley Public Power & Irrigation District*,<sup>156</sup> this clause was held to guarantee a plaintiff's right to recover permanent damage rather than to sue for each trespass committed by escaping reservoir water.<sup>157</sup>

The clause also is said to be "self executing." By this, it is meant that no ancillary legislation is needed to effectuate the right, although legislation may provide higher protections of the right secured.<sup>158</sup> Thus, the court has found that this provision provides writs and powers not expressly granted by positive law. For example, in *Burnham v. Bennison*,<sup>159</sup> the court found the provision acted to give the court power in equity to remove malfeasant trustees. This power vested constitutionally and was "beyond the power of the legislature to limit or control."<sup>160</sup> In a similar case, the court held that the writ *coram nobis* was available for one wrongly convicted, and "made imperative by section 13, art. I."<sup>161</sup>

Some cases appear to deviate from the literal language of the section. These cases are distinguishable in that no remedy at common law existed or was believed to exist. In *Goddard v. City of Lincoln*,<sup>162</sup> a notice limitation of liability in negligence for first class cities was upheld.<sup>163</sup> The rationale of *Goddard* was that the duty was imposed by statute and not common law, and as a statutory right, it was revocable.<sup>164</sup>

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152. NEB. CONST. art I, § 13.

153. 87 Neb. 146, 127 N.W. 145 (1910).

154. *Id.* at 181, 127 N.W. at 157.

155. *State v. Guatney*, 207 Neb. 501, 506-07, 299 N.W.2d 538, 542 (1980). Although medical malpractice review panels now are voluntary, and thus outside the scope of this article, the panels as administered prior to 1984 raise severe questions under this aspect of the open courts provision. See *infra* note 175.

156. 136 Neb. 280, 285 N.W. 585 (1939).

157. *Id.* at 286, 285 N.W. at 589. The decision is of significance should the Legislature consider periodic payment as a feature of tort reform.

158. *Wilfong v. Omaha & C.B. St. Ry.*, 129 Neb. 600, 608, 262 N.W. 537, 541 (1935).

159. 121 Neb. 291, 236 N.W. 745 (1931).

160. *Id.* at 298, 236 N.W. at 748.

161. *Carlsen v. State*, 129 Neb. 84, 96, 261 N.W. 339, 346, *cert. denied*, 293 U.S. 607 (1934).

162. 69 Neb. 594, 96 N.W. 273 (1903).

163. *Id.* at 597, 96 N.W. at 275.

164. Originally, actions against a municipal corporation were conceived of as actions against the people of the city, since the municipality had no status as a corporate person. *Russell v. Men of Devon*, 2 Term Rep. 667, 100 Eng. Rep. 359 (1798),



In *Muller v. Nebraska Methodist Hospital*<sup>165</sup> the court upheld the common law doctrine of charitable immunity. The *Muller* court rested its decision on its reasoning that "[i]t is a primary duty of the courts to safeguard this declaration of right and remedy. But where no right or remedy exists, under either the common law or some statute, this constitutional provision creates none."<sup>166</sup> Clearly, the right to be made whole from injuries caused by another's negligence existed at common law and such right is protected under section 13.

However, it is noteworthy that the court later felt compelled to reverse itself. *Myers v. Drozda*<sup>167</sup> overruled *Muller*, relying on section 13.<sup>168</sup> In *Imig v. March*,<sup>169</sup> the court again was compelled by section 13 to overrule the doctrine of spousal immunity.<sup>170</sup>

While the right to be made whole is protected by the constitution, the court has held on several occasions that procedural conditions may be placed on the remedy. The court may require a party to comply with previous orders of the court in situations of continuing jurisdiction.<sup>171</sup> The legislature may change the burden of proof without offending this provision.<sup>172</sup> Similarly, a choice of law provision in a contract that denies access to a Nebraska forum but provides meaningful access to a sister state's forum will be enforced, absent fraud or unequal bargaining power.<sup>173</sup>

## 2. Prendergast and Colton

Two recent decisions depart severely from the preceding line of cases. The first is *Prendergast v. Nelson*.<sup>174</sup> Parts of *Prendergast* can be read as consistent with prior cases under section 13. For example, the portion of the law that upholds mandatory pre-trial medical re-

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quoted in W. KEETON, PROSSER AND KEETON ON TORTS § 131, at 1051 (5th ed. 1984). By the 1970s, about half the states retained some form of municipal immunity, although now based on policy reasons. *Id.* at 1052.

165. 160 Neb. 279, 70 N.W.2d 86 (1955).

166. *Id.* at 288, 70 N.W.2d at 91. A similar holding concerning parental immunity can be found in *Pullen v. Nowak*, 169 Neb. 211, 215-16, 99 N.W.2d 16, 21 (1959).

167. 180 Neb. 183, 141 N.W.2d 852 (1966).

168. *Id.* at 186, 141 N.W.2d at 854.

169. 203 Neb. 537, 279 N.W.2d 382 (1979).

170. *Id.* at 544-545, 279 N.W.2d at 386.

171. *Reed v. Reed*, 70 Neb. 779, 98 N.W. 73 (1904). The plaintiff in *Reed* refused to comply with an order for the payment of temporary alimony. *Id.* at 784, 98 N.W. at 75.

172. *Clarke v. Weatherly*, 131 Neb. 816, 818, 270 N.W. 316, 317 (1936). The legislative enactment mandated gross negligence as a precondition to recovery under a guest statute.

173. *Haakinson & Beaty Co. v. Inland Ins. Co.*, 216 Neb. 426, 344 N.W.2d 454 (1984). A concurring justice expressed doubts based on section 13. *Id.* at 432, 344 N.W.2d at 459 (White, J., concurring).

174. 199 Neb. 97, 256 N.W.2d 657 (1977).

view panels can be read as consistent with *Reed* and other cases holding the legislature or court may place procedural preconditions on access to the forum.<sup>175</sup>

However, one portion of *Prendergast* stands in sharp contrast to *First Trust, Wilfong, Imig, and Myers*. *Prendergast* upheld the \$500,000 limitation on damages, reasoning that the same principle was involved as that involved when the Legislature raised the degree of negligence necessary to recover in guest cases. The court further explained its reasoning, stating that "[i]n enacting the medical malpractice damage limitations, the Legislature is doing no more than legislatures of other states have done in the enactment of no-fault statutes in tort actions."<sup>176</sup> This reasoning is flawed because it completely ignores the fact that traditional no-fault schemes preserve access to the courts for excess damages,<sup>177</sup> which would be significant to their validity under section 13.

The second case is *Colton v. Dewey*.<sup>178</sup> *Colton* deviates further from established precedent. In *Colton*, a ten-year statute of repose barred the plaintiff's cause of action four years before the plaintiff discovered the injury. The court upheld the limitation, reasoning "[t]he requirement . . . that all courts be open . . . does not mean that [time] limits may not be imposed."<sup>179</sup> Further, the court held it was within the power of the legislature to abolish remedies. "The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress. . . . The legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is dis-

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175. However, the Missouri Supreme Court struck down mandatory pretrial review under an almost identical open courts provision. *State ex rel. Cardinal Glennon Memorial Hosp. v. Gaertner*, 583 S.W.2d 107, 110 (Mo. 1979). In any case, a problem may have existed with the panels and the without delay portion of the statute. Delays of two years or more appear not to have been uncommon. Compare *Barry v. Bohi*, 221 Neb. 651, 380 N.W.2d 249 (1986) (which lasted more than six years from filing to appellate review). The Department of Insurance estimates that the average time to close a file under this procedure ranged from one to three years. Interview, *supra* note 74.

176. *Prendergast v. Nelson*, 199 Neb. 97, 121, 256 N.W.2d 657, 672 (1977).

177. Keeton describes no-fault statutes as a partial exemption from tort. The usual scheme provides that for actions under policy limits, the party may not recover in tort, but instead recovers from his own carrier. Access to the courts is preserved for excess amounts. W. KEETON, PROSSER AND KEETON ON TORTS § 84, at 607 (5th ed. 1984).

178. 212 Neb. 126, 321 N.W.2d 913 (1982). *Colton* was reaffirmed in *Rosnick v. Marks*, 218 Neb. 499, 507, 357 N.W.2d 186, 191 (1984) (legal malpractice) and *Smith v. Dewey*, 214 Neb. 605, 607-08, 335 N.W.2d 530, 532 (1983) (medical malpractice). In addition, *Colton* was relied upon in a federal decision upholding a 10-year products liability statute of repose. *Groth v. Sandoz, Inc.*, 601 F. Supp 453, 455 (D. Neb. 1984).

179. *Colton v. Dewey*, 212 Neb. 126, 129, 321 N.W.2d 913, 916 (1982).

turbed.'"<sup>180</sup> Significant is the fact that the borrowed language is from a New Jersey case. The New Jersey Constitution contains no open courts clause.

### 3. *Analysis*

The borrowed language in *Colton* might be true in a state where every person is not guaranteed a remedy, but it can never be true in Nebraska. Texas, with an open courts clause that is phrased in language identical to that of the Nebraska clause, struck down a six-year statute of repose.<sup>181</sup> Under an identical Ohio open courts provision, the Ohio Supreme Court invalidated a four-year statute of repose: "The appellant has no remedy for an injury to his body when his claim is extinguished before he knew of the injury or could have reasonably discovered it. . . . The language of the Constitution is clear and leaves little room for maneuvering."<sup>182</sup> Based on an almost identical open courts provision, the Utah Supreme Court struck down a ten-year statute of repose.<sup>183</sup> Finally, noting its open courts clause (like Nebraska's) stated that "[e]very person . . . ought to find a certain remedy,"<sup>184</sup> the Supreme Court of Rhode Island emphasized that "no word or section must be assumed to have been unnecessarily or needlessly added."<sup>185</sup>

*Colton*, and by implication portions of *Prendergast*, are either clear error or an abdication of judicial responsibility. Neither possibility is acceptable. The decisions are aberrational and in conflict with basic rights secured by our state constitution. The decisions also place Nebraska in a clear minority when interpreting the open courts clause.

The logical argument is as follows. The greater includes the lesser; if it is competent for the legislature to abolish a remedy, it is competent for it to place any precondition on the remedy that is desired. If the legislature could abolish plaintiff's right to sue for trespass, it could require plaintiff to sue for each trespass. The legislature could thus reestablish charitable immunity, and many hospitals never would be liable for damages. The same would be true of spousal immunity or parental immunity. The legislature could go even further and decree that pain and suffering damages die with the plaintiff or that they might not be recovered at all.

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180. *Id.* at 130, 321 N.W.2d at 916 (quoting *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199-200, 293 A.2d 662, 667 (1972)).

181. *Sax v. Votteler*, 648 S.W.2d 661, 664-67 (Tex. 1983).

182. *Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 46, 512 N.E.2d 626, 627-28 (1987) (citations omitted).

183. *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985).

184. R.I. CONST. art. 1, § 5.

185. *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195, 198 (R.I. 1984). See generally *Lambert, Medical Negligence: Statutes of Repose*, 31 ATLA L. REP. 16 (Feb. 1988).

This cannot be so under section 13. Compare the language of *Wilfong*—"As this constitutional provision neither expressly nor by necessary implication requires [here, that the plaintiff's damages be under a certain amount] . . . nor in any manner conditions the remedy it provides on that fact . . . . [T]he cause of action does not abate, but survives. . . ." <sup>186</sup> and *Elder*—"[I]s there no remedy [here, for damages over the limit]? If not, then the boast of the common law that there is no wrong without a remedy is without foundation. Our constitution, however, is broader than the common law." <sup>187</sup>

It has been suggested that the effect of this provision is to preserve common law rights existing at the time of the constitution's adoption from subsequent diminution or abrogation, unless a reasonable substitute is provided. <sup>188</sup> The exact nature of the rights incorporated or preserved need not be decided here, but the right to be made whole from a tortious injury suffered must be close to their core. The alternative is a Susan Von Stetina on Medicaid or receiving no care at all, because she has exceeded the maximum limit of her award. At a minimum, section 13 demands full recovery of economic damages.

The right to noneconomic damages is somewhat vague, but consider the following. If excessive noneconomic damages are awarded, a remittitur will be sought and granted. Without a limit, noneconomic damages never will exceed what is appropriate for the plaintiff. The limit only can operate to cut off appropriately awarded damages in direct conflict with the constitutional command that "[e]very person . . . shall have a remedy." <sup>189</sup>

A more sophisticated argument that noneconomic limits are a denial of a remedy is readily available as well. The economic interests of the plaintiff and contingent fee attorney are adverse to begin with. Because the attorney recovers a fractional portion of the recovery, the

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186. *Wilfong v. Omaha & C.B. St. Ry.*, 129 Neb. 600, 611, 262 N.W. 537, 542 (1935). See *supra* notes 138-40 and accompanying text.

187. *State ex rel. Benton v. Elder*, 31 Neb. 169, 185, 47 N.W. 710, 715 (1891). See *supra* notes 136-37 and accompanying text.

188. Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 NEB. L. REV. 150, 176-77 (1983). The author concluded the statute of repose was unconstitutional under this section. *Id.* at 191-96. I agree with the conclusion and urge readers interested in this aspect of tort reform to review the article.

It is also noted that the statute of repose could lead to the barring of an action *before conception* of the plaintiff. In *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (1984), a nurse misrecorded the blood type of plaintiff's mother as Rh positive when in fact it was Rh negative. Because of the misrecording, she was not administered a drug that prevents development of an immune response to Rh positive blood. Six years later, the plaintiff was conceived. Plaintiff was stillborn because of destruction of her Rh positive blood cells by the mother's immune response. The statute had run three years before plaintiff's conception. The court ultimately struck down the statute on equal protection grounds.

189. NEB. CONST. art I, § 13.

marginal return per unit of effort will cross the marginal cost line significantly earlier than would be true if there was no division of interest. Limitations exploit the built-in adversity further by reducing the ultimate recovery. In fact, the difference may mean a powerful incentive is created to settle prior to trial. At the margin, limits block access to the court.<sup>190</sup> The open courts argument is essentially an extension of the *Vinsonhaler*<sup>191</sup> reasoning that inability to pay fees should not cut off a legitimate claim.

Other aspects of the statute and bill would appear permissible under the "open courts" clause. A modification of joint and several liability affects which defendant pays, but does not destroy the remedy. Collateral source modification again ultimately affects only who pays and not the amount of recovery.

A word needs to be added about the "double deduction" argument and Nebraska law. The preservation of subrogation rights in L.B. 425 raises an interesting issue. The Nebraska legislation explicitly preserved subrogation rights against defendants.<sup>192</sup> By way of contrast, California, in abolishing its collateral source rule, provided that no collateral source could recover against the plaintiff, nor would it be subrogated to the right of the plaintiff against a defendant.<sup>193</sup> The remaining question for Nebraska is whether a collateral source could recover from a plaintiff.

This problem has been referred to as a double deduction, since the jury would deduct a first time, the collateral source a second time.<sup>194</sup> However, as judicially construed, no double deduction problem would be posed in Nebraska. Subrogation is either "equitable" or "conventional." Equitable subrogation is restitutionary and is triggered by unjust enrichment.<sup>195</sup> Since the jury must consider collateral payments, presumably it excludes these amounts from damages. There is no "enrichment"; therefore, there is no subrogation as against the plaintiff.

Conventional subrogation is contractual. This may or may not be

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190. For a more explicit discussion of how caps increase the built-in adversity of financial interest between attorney and client, see *Roa v. Lodi Medical Group*, 37 Cal. 3d 920, 942-48, 211 Cal. Rptr. 77, 91-96, 695 P.2d 164, 178-83 (1985) (Bird, C.J., dissenting), *appeal dismissed*, 474 U.S. 990 (1985).

191. *Douglas County v. Vinsonhaler*, 82 Neb. 810, 118 N.W. 1058 (1908).

192. "Nothing in sections 11 to 13 of this act shall interfere with any right of subrogation nor shall it preclude the collection of the same from any defendant." L.B. 425, § 12(2), 90th Leg., 1st Sess. (1987).

193. CAL. CIV. CODE § 3333.1(b) (West Supp. 1988).

194. *Carson v. Maurer*, 120 N.H. 925, 940, 424 A.2d 825, 836 (1980).

195. RESTATEMENT OF RESTITUTION § 162 (1937). See also *Cagle, Inc. v. Sammons*, 198 Neb. 595, 602, 254 N.W.2d 398, 403 (1977) ("The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable"); cited with approval in R. WORKS, NEBRASKA PROPERTY & LIABILITY INSURANCE LAW § 9.1, at 191 (1985). Here, the debt is not paid by the tortfeasor to the plaintiff.

the same thing—"[[j]udicial opinions . . . often tacitly assum[e] that the contractual provisions are declaratory of the rights which equitable principles would decree."<sup>196</sup>

Regardless of whether theoretical differences exist, in Nebraska the right of the subrogee always has been closely equated with the right of the subrogor. An early court may well have resolved the issue when it stated that "no cause of action can exist on behalf of the insurer, unless it existed in favor of the insured."<sup>197</sup> While the case is cited for the proposition that the insurer has no greater rights against third parties than the insured, it also would seem to say that when the insured presumably has never recovered, there is nothing to subrogate.<sup>198</sup> To the extent this interpretation is true, no constitutional problems are raised. If a double deduction is allowed on a contractual basis, the issue is identical to those raised by a maximum limitation on economic damages. In addition, due process issues of fairness may be raised.<sup>199</sup> It is to these issues arising under due process and the parallel guarantee of equal protection that we now turn.

### C. Federal Equal Protection and Due Process Analysis

Although the Nebraska Constitution carries unique guarantees that appear dispositive of the majority of tort reform issues, the possibility of aberrant interpretation of the provisions necessitates a review of federal law. Some courts, acting under either federal due process or equal protection analysis, have held various features of tort reform packages unconstitutional.

#### 1. Traditional Equal Protection Tests

Traditional equal protection testing involves a two-tiered analysis. If the legislation involves a "suspect" class or impinges on "fundamental" rights, it is subjected to "low scrutiny." Examples of suspect classes are race<sup>200</sup> and national origin.<sup>201</sup> Examples of fundamental rights include the right of religious expression,<sup>202</sup> the right to vote,<sup>203</sup>

196. R. WORKS, *supra* note 195, § 9.1, at 191 (1985).

197. *Omaha & R.V. Ry. v. Granite State Fire Ins. Co.*, 53 Neb. 514, 519, 73 N.W. 950, 951 (1898)(quoted in R. WORKS, *supra* note 195, § 9.2, at 193).

198. The Nebraska rule subrogates the employer directly to the employee's right as against third parties in workers' compensation cases. NEB. REV. STAT. § 48-118 (1984). Double deduction could occur if the rule was that the employee proceeded directly against third parties and that a lien attached to the proceeds, but would not occur under the Nebraska rule.

199. See *infra* notes 235-40 and accompanying text.

200. *E.g.*, *Loving v. Virginia*, 388 U.S. 1, 8 (1967).

201. *E.g.*, *Hernandez v. Texas*, 347 U.S. 475, 481 (1954).

202. *E.g.*, *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

203. *E.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966).

the right to marry,<sup>204</sup> the right to travel,<sup>205</sup> the right to make reproductive decisions,<sup>206</sup> and the right to political association.<sup>207</sup> In general, fundamental rights have been defined as those "explicitly or implicitly guaranteed by the constitution."<sup>208</sup> As has been stated, "the right to recover the full extent of damages one is owed from a tortfeasor is not on the list."<sup>209</sup>

Low scrutiny is exactly what it implies. "The constitutional safeguard is offended only if the classification rests on grounds [that are] wholly irrelevant to the achievement of the State's objective . . . . A [statute] will not be set aside [as discriminatory] if any state of facts reasonably may be conceived to justify it."<sup>210</sup> The creativity in inventing facts to justify the legislation at times resembles that necessary to attack a perpetuities problem. Further, considerable latitude is given in areas of social and economic welfare:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis" it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."<sup>211</sup>

In addition, it has been said that "[w]here there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court the legislature was mistaken."<sup>212</sup>

In contrast, if a statute reaches a protected area, the burden is shifted to the state to show the statute was "necessary to promote a compelling governmental interest."<sup>213</sup> If a compelling interest can be found, the means utilized to promote that interest must be the least restrictive possible.

The two-tiered test left much to be desired. In practice, the choice of low level scrutiny was merely a precursor of the outcome, involving little analysis. Beginning with cases involving gender,<sup>214</sup> intermediate scrutiny was introduced. This level also has been applied to illegiti-

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204. *E.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978).

205. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969).

206. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 152-54 (1973).

207. *E.g.*, *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). For a discussion of fundamental rights, see generally NOWAK, ROTUNDA & YOUNG, *CONSTITUTIONAL LAW* 418 (1978).

208. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

209. *Williams v. Lallie Kemp Charity Hosp.*, 428 So. 2d 1000, 1010 (La. Ct. App. 1983), *cert. denied*, 434 So. 2d 1093 (La. 1983).

210. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

211. *Danridge v. Williams*, 397 U.S. 471, 485 (1970).

212. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

213. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

214. *Craig v. Boren*, 429 U.S. 190 (1976).

macy.<sup>215</sup> The test at intermediate scrutiny is subject to varying formulations. In *Reed v. Reed*,<sup>216</sup> the Court said that the legislatively created classes "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."<sup>217</sup> Further, the legislation "must serve important governmental objectives and must be substantially related to those objectives."<sup>218</sup>

To further complicate matters, the Court has been tightening low scrutiny by undertaking a more searching examination of legislative purpose.<sup>219</sup> This feature may represent heightened judicial scrutiny or may indicate the lines between due process and equal protection have begun to blur.

The majority of cases involving equal protection deal with matters other than maximum damage limitations. A line of cases dealing with medical malpractice review panels is apposite only in terms of the level of scrutiny chosen, since mandatory review itself has been abolished in Nebraska. Further, the courts applying equal protection analysis were reviewing a precondition on a remedy, not an elimination of the remedy.

With this in mind, note that the majority of courts have held medical malpractice screening panels do not violate equal protection. The courts generally have used a low scrutiny test. The reasoning is that the panels reasonably are related to the legitimate legislative purpose of deterring meritless claims or of reducing health care costs through alternate dispute resolution.<sup>220</sup> In *Carter v. Sparkman*<sup>221</sup> the court

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215. *Trimble v. Gordon*, 430 U.S. 762 (1977).

216. 404 U.S. 71 (1971).

217. *Id.* at 76.

218. *Craig v. Boren*, 429 U.S. 190, 197 (1976). The test is patterned after *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). *Royster*, at the time, was not heightened scrutiny as the Court stated its test that classes "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 415.

219. *See, e.g., Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 668 (1981); *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972).

220. *Seoane v. Ortho Pharmaceuticals, Inc.*, 660 F.2d 146, 149-50 (5th Cir. 1981), *aff'd*, 472 F. Supp. 468, 471-72 (E.D. La. 1979); *Diantonio v. Northampton-Accomack Memorial Hosp.*, 628 F.2d 287, 291 (4th Cir. 1980); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1173-74 (5th Cir. 1979); *DiFilippo v. Beck*, 520 F. Supp. 1009, 1015-16 (D. Del. 1981); *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421, 430-31 (N.D. Ind. 1979), *aff'd*, 603 F.2d 646 (7th Cir. 1979); *Eastin v. Broomfield*, 116 Ariz. 576, 585, 570 P.2d 744, 753 (1977); *Lacy v. Green*, 428 A.2d 1171, 1177-78 (Del. Super. Ct. 1981); *Suchit v. Baxt*, 176 N.J.L. 407, 420-23, 423 A.2d 670, 676-77 (N.J. Super Ct. Law Div. 1980); *Comiskey v. Arlen*, 55 A.D.2d 304, 313-15, 390 N.Y.S.2d 122, 128-29 (1976), *aff'd*, 43 N.Y.2d 696, 372 N.E.2d 34, 401 N.Y.S.2d 200 (1977); *Beatty v. Akron City Hosp.*, 67 Ohio St. 2d 483, 488-92, 424 N.E.2d 586, 591-95 (1981); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 506-12, 261 N.W.2d 434, 441-44 (1978).

221. 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977).



upheld panel review, but described the procedure as being at the "outer limits of constitutional tolerance."<sup>222</sup> The court in *Boucher v. Sayeed*<sup>223</sup> found no "insurance crisis" existed, and struck down review panels under low scrutiny analysis. *Boucher* is perhaps distinguishable since no legislative findings were declared in the Act in question.<sup>224</sup>

Other cases have upheld collateral source rule abrogations under low scrutiny, reasoning the elimination of the rule is reasonably related to holding health care costs down and promoting the availability of insurance.<sup>225</sup> Likewise, the majority of courts allow a shorter statute of limitations for medical malpractice, including abrogation of tolling provisions for undiscoverable injury, under low scrutiny, reasoning the statutes reasonably are related to controlling health care costs. Some courts note that a large component of malpractice insurance cost is the possibility that a suit may be brought many years later.<sup>226</sup>

Two Ohio cases have struck down maximum damage limitations under low scrutiny. *Simon v. St. Elizabeth Medical Center*<sup>227</sup> struck a \$200,000 limit on general damages as violative of both state and federal equal protection without detailed analysis. In *Duren v. Suburban Community Hospital*,<sup>228</sup> a second Ohio court reached the same result, again without detailed analysis—"Simply stated, the legislative scheme of shifting responsibility for loss from one of the most affluent segments of society to those who are most unable to sustain that burden, i.e., horribly injured or maimed individuals, is not only inconceiv-

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222. *Id.* at 806.

223. 459 A.2d 87 (R.I. 1983).

224. *Id.* at 93.

225. *Baker v. Vanderbilt Univ.*, 616 F. Supp. 330, 331-32 (M.D. Tenn. 1985); *Eastin v. Broomfield*, 116 Ariz. 576, 584-85, 570 P.2d 744, 752-53 (1977); *Barme v. Wood*, 37 Cal. 3d 174, 180-81, 689 P.2d 446, 449-50, 207 Cal. Rptr. 816, 819-21 (1984); *Pinillos v. Cedars of Lebanon Hosp.*, 403 So. 2d 365, 367 (Fla. 1981); *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550, 557-58 (Iowa 1980); *Everett v. Goldman*, 359 So. 2d 1256, 1265-67 (La. 1978); *Perna v. Pirozzi*, 92 N.J. 446, 457-58, 457 A.2d 431, 437 (1983).

226. *See, e.g., Fitz v. Dolyak*, 712 F.2d 330, 332-33 (8th Cir. 1983); *Houk v. Furman*, 613 F. Supp. 1022, 1034-36 (D. Me. 1985); *Reese v. Rankin Fite Memorial Hosp.*, 403 So. 2d 158, 160-61 (Ala. 1981); *Landgraff v. Wagner*, 26 Ariz. App. 49, 546 P.2d 26 (1976), *appeal dismissed*, 429 U.S. 806 (1976); *Carmichael v. Silbert*, 422 N.E.2d 1330, 1332-33 (Ind. App. 1981); *Armijo v. Tandysh*, 98 N.M. 181, 183-84, 646 P.2d 1245, 1247-48 (1981), *cert. quashed*, 98 N.M. 336, 648 P.2d 794 (1962), *cert. denied*, 459 U.S. 1016 (1982); *Roberts v. Durham County Hosp.*, 56 N.C. App. 533, 540, 289 S.E.2d 879 (1982), *aff'd*, 307 N.C. 465, 298 S.E.2d 384 (1983); *Harrison v. Schrader*, 569 S.W.2d 822, 826 (Tenn. 1978). In *Sax v. Votteler*, 636 S.W.2d 461, 464 (Tex. App. 1982), *rev'd*, 648 S.W.2d 661, 663-67 (Tex. 1983), a six-year statute of limitations initially was upheld under low scrutiny. The Texas Supreme Court reversed based on an open courts clause that is *identical* to the Nebraska clause.

227. 3 Ohio Op. 3d 164, 355 N.E.2d 903 (C.P. Cuyahoga County 1976).

228. 24 Ohio Misc. 2d 25, 495 N.E.2d 51 (Ct. Common Pleas 1985).

able, but shocking to this court's conscience."<sup>229</sup>

In a Colorado case, *Austin v. Litvak*,<sup>230</sup> the court also struck down a shortened statute of limitations under low scrutiny. The statute was tolled only if the injury was fraudulently concealed or consisted of failure to remove a foreign object. The *Austin* court noted that claims based on fraudulent concealment were more likely to be frivolous or difficult to prove than claims for simple malpractice that were over two years old. Thus, the court concluded the legislature lacked a rational basis for the distinction.<sup>231</sup>

In contrast, *Fein v. Permanente Medical Group*<sup>232</sup> upheld a \$250,000 limitation on noneconomic damages under low scrutiny. The California court stated: "[I]t appears obvious that . . . a ceiling of \$250,000 on the recovery of noneconomic damages—is rationally related to the objective of reducing the costs of malpractice defendants and their insurers."<sup>233</sup> The dissent was vehement: "Injured infants are prohibited from recovering more than three or four thousand dollars per year, no matter how excruciating their pain . . . . The idea of preserving insurance by imposing huge sacrifices on a few victims is logically perverse."<sup>234</sup>

## 2. Traditional Due Process Tests

Although the lines between equal protection and due process often are blurred by the courts, the two modes of analysis do form distinct constitutional provisions with distinct analysis. "Due process emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation may be treated. Equal protection on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."<sup>235</sup> An example of a situation in which equal protection might be violated with no accompanying due process violation is where a plaintiff lets a statute of limitations run, but the statute is found to apply to an invalid class. Thus, fairness with the individual would not be offended, but the statute would be an impermissible classification.<sup>236</sup>

The test for due process violations was best stated in *Nebbia v. New*

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229. *Id.* at 28, 495 N.E.2d at 56.

230. 682 P.2d 41 (Colo. 1984).

231. *Id.* at 50.

232. 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985), *appeal denied*, 474 U.S. 892 (1985).

233. *Id.* at 159, 695 P.2d at 680, 211 Cal. Rptr. at 383.

234. *Id.* at 171-73, 695 P.2d at 689-90, 211 Cal. Rptr. at 392-93 (Bird, C.J., dissenting).

235. *Ross v. Moffit*, 417 U.S. 600, 609 (1974).

236. This situation is found in *Carmichael v. Silbert*, 422 N.E.2d 1330, 1333 (Ind. App. 1981).

*York*,<sup>237</sup> in which the Court stated "[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied."<sup>238</sup> The obvious result is that it is difficult for a law to offend federal due process.<sup>239</sup>

By a majority of courts, medical malpractice screening panels have been held not to violate the due process clause. These courts reason that medical malpractice is a tort with distinct characteristics, and it is neither unfair nor discriminatory to treat these individuals differently.<sup>240</sup>

### 3. Duke Power and the White Dictum

Another factor that comes into play in federal due process analysis is the so-called *White* dictum. The issue arose when the United States Supreme Court considered workers' compensation laws in *New York Central Ry. v. White*.<sup>241</sup> The Court in *White* held that workers' compensation laws did not violate the federal due process standard. However, the Court added, "it perhaps may be doubted whether the state could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead."<sup>242</sup> In the workers' compensation statutes context, the substitution for unlimited damages was strict liability on the part of the employer. A right had been given up on one side, defenses on the other. The dictum raises the question of whether this sort of quid pro quo is necessary.

The issue of whether a quid pro quo is required when a common law right is abrogated also was left open in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*<sup>243</sup> *Duke Power* involved a con-

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237. 291 U.S. 502 (1934).

238. *Id.* at 537.

239. It also would appear that any law offending federal due process would be a special law under NEB. CONST. art. III, § 18. See *supra* notes 116-24 and accompanying text.

240. See, e.g., *Seoane v. Ortho Pharmaceuticals, Inc.*, 660 F.2d 146 (5th Cir. 1981), *aff'd* 472 F. Supp. 468, 472-73 (E.D. La. 1979); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1175-77 (5th Cir. 1979); *Everett v. Goldman*, 359 So. 2d 1256, 1267-69 (La. 1978); *Linder v. Smith*, 629 P.2d 1187, 1191-92 (Mont. 1981); *Comiskey v. Arlen*, 55 A.D.2d 304, 312-15, 390 N.Y.S.2d 122, 128-30 (1976), *aff'd*, 43 N.Y.2d 696, 372 N.E.2d 34, 401 N.Y.S.2d 200 (1977). Some of the cases upholding the panels may be distinguishable as involving sovereign immunity—the greater right to abolish liability includes the lesser right to place limitations or conditions upon it. For cases involving claims against sovereign entities, see *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985) and *Williams v. Lallie Kemp Charity Hosp.*, 428 So. 2d 1000 (La. Ct. App. 1983), *cert. denied*, 434 So. 2d 1093 (La. 1983).

241. 243 U.S. 188 (1917).

242. *Id.* at 201.

243. 438 U.S. 59 (1978).

gressionally set maximum liability of \$560 million for a nuclear power accident. The limit was based upon "expert appraisals of the exceedingly small risk of a nuclear incident involving claims in excess of \$560 million."<sup>244</sup> Further, the Court noted that in the event the limit was exceeded, "Congress would likely enact extraordinary relief provisions to provide additional relief, in accord with prior practice."<sup>245</sup> The legislative history also supported the notion the limit was not "an ultimate bar to further relief of the public."<sup>246</sup> Thus, the case is likely to be distinguishable.

In *Johnson v. St. Vincent Hospital, Inc.*,<sup>247</sup> the Indiana Supreme Court sustained a \$500,000 limitation on the strength of analogy to *Duke Power*—"[b]oth involved a private industry which was reluctant to provide its services because of shortages for the effective insurance for the risks attendant to production."<sup>248</sup> Further, to the extent that a quid pro quo requirement was asserted, the Act met it by providing a more likely source of recovery. As the *Johnson* court noted, "[i]nsurance companies have been known to go bankrupt and to leave those having claims and judgments against insureds without any means of collection."<sup>249</sup>

It is important to remember the *White* dictum arose in a due process analysis and thus, it has no relation whatsoever to the question of special laws or open courts. The majority of courts have held due process and equal protection alone do not mandate a quid pro quo.<sup>250</sup> It also should be noted that all of these cases arose in the context of medical review panels. Review in and of itself may add delay or expense, but does not have a predictable effect on the amount of damages. In the context of limitation on damages, the issue may become important.<sup>251</sup> With reference to the aspect of maximum limits, this question was left open in *Wright v. Central DuPage Hospital Association*.<sup>252</sup>

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244. *Id.* at 85.

245. *Id.* In fact, the Act was altered in 1987 to raise the limit to \$7 billion. Omaha World-Herald, July 31, 1987, at 11, col. 1. The change further established a procedure whereby if "a single accident should prove even more catastrophic, the president would immediately name a commission to recommend additional compensation from the federal treasury." *Id.*

246. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 86 (1978)(quoting H.R. REP. NO. 883, 89th Cong., 1st Sess. 6-7 (1965)).

247. 273 Ind. 374, 404 N.E.2d 585 (1980).

248. *Id.* at 395-96, 404 N.E.2d at 599.

249. *Id.* at 399, 404 N.E.2d at 601.

250. *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978).

251. Justice White dissented from a denial of certiorari in *Fein v. Permanente Medical Group*, 474 U.S. 892 (1985), and would have resolved the question. *Id.* at 894-95 (White, J., dissenting).

252. 63 Ill. 2d 313, 329, 347 N.E.2d 736, 742 (1976).

#### 4. Heightened Scrutiny and Medical Tort Reform

Some recent state cases have found various tort reform measures unconstitutional under several forms of heightened scrutiny. The trigger for heightened scrutiny has been either an elevation of the status of the right to recover or definition of malpractice victims as a quasi-suspect class.

*Carson v. Maurer*<sup>253</sup> struck down a collateral source abrogation and a \$250,000 limitation on noneconomic damages under intermediate scrutiny. To do so, the *Carson* court elevated the nature of the right to recover. The rights were not fundamental, but were "sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test."<sup>254</sup>

The *Coburn v. Agustin*<sup>255</sup> court used both an important right and a quasi-suspect class analysis to strike down a collateral source abrogation that applied only in medical malpractice cases. First, the court concluded that although the right was not fundamental, the Kansas open courts clause made it "an important substantive right."<sup>256</sup> This alone was not enough to trigger high scrutiny. However, the court also found "[m]edical malpractice victims generally have no control over the inception of their afflictions or illnesses and even less choice concerning the medical mis, mal, or nonfeasance practiced on them. Moreover, victims of medical malpractice are relegated to a position of political powerlessness."<sup>257</sup> The court then struck down the statute, reasoning "[i]n this case, a privilege is being created on behalf of doctors and insurance companies, while the class that pays the price is comprised of injured and powerless malpractice victims."<sup>258</sup>

*Jones v. State Board of Medicine*<sup>259</sup> also applied intermediate scrutiny based on the classification created by a statutory \$300,000 damage limit. The Idaho court held: "[I]t is apparent from the face of the Act that a discriminatory classification is created based on the degree of injury."<sup>260</sup> The court ultimately remanded the case to develop evidence of whether there was an "insurance crisis" in the state of Idaho.

A dissenting justice in *American Bank & Trust Co. v. Community*

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253. 120 N.H. 925, 424 A.2d 825 (1980).

254. *Id.* at 932, 424 A.2d at 830.

255. 627 F. Supp 983 (D. Kan. 1985).

256. *Id.* at 994.

257. *Id.*

258. *Id.* at 996. *Coburn* is in direct conflict with *Crowe v. Wigglesworth*, 623 F. Supp. 699 (D. Kan. 1985). In *Crowe*, the earlier of the two, a different district judge upheld the Act under low scrutiny. *Id.* at 704-05.

259. 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977).

260. *Id.*

*Hospital*<sup>261</sup> developed the quasi-suspect class further:

Various inherent characteristics of the burdened group prevent it from adequately advancing its interests in the political process. It is an extraordinarily small group to be singled out to carry the burden of a general "crisis". Its members . . . may be physically or mentally disabled. Membership in the group is *involuntary*. . . . At the time MICRA was enacted, the individuals who were to make up the group were unaware of that fact.<sup>262</sup>

Other cases proceed to heightened scrutiny by examining the nature of the right involved. In *White v. Montana*<sup>263</sup> the court looked to state law when determining the right to recover for injury is of a special character. Montana's open courts provision was the trigger of strict scrutiny. "The language 'every injury' embraces all recognized compensable components of injury, including the right to be compensated for physical pain and mental anguish and loss of the enjoyment of living. Therefore, strict scrutiny attaches."<sup>264</sup> Nebraska's open courts provision contains the same language.

The North Dakota Supreme Court struck down an absolute damage limitation of \$300,000 in *Arneson v. Olson*.<sup>265</sup> The decision is partially distinguishable in that what is called intermediate scrutiny under a federal test is the lowest scrutiny available under North Dakota law.<sup>266</sup> However, the decision is interesting in two respects. First, the court, like the Nebraska court in *First Trust Co. v. Smith*,<sup>267</sup> refused to bow to a legislative determination that an insurance crisis existed when in fact none did.<sup>268</sup> This can be viewed as an examination of legislative purpose. Second, the court related legislative purpose to legislative means in a formulation that is useful when considering the Medical-Hospital Liability Act—"[C]ertainly the limitation of recovery does not provide adequate compensation to patients with meritorious claims, on the contrary, it does just the opposite for the most seriously injured claimants. It does nothing towards the elimination of nonmeritorious claims."<sup>269</sup>

*Baptist Hospital v. Baber*<sup>270</sup> struck down an absolute limitation of \$500,000 on medical malpractice with the court utilizing equal protec-

261. 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984), *vacating* 33 Cal. 3d 674, 660 P.2d 829, 190 Cal. Rptr. 371 (1983).

262. *Id.* at 397, 683 P.2d at 695, 204 Cal. Rptr. at 697 (Bird, C.J., dissenting).

263. 203 Mont. 363, 661 P.2d 1272 (1983).

264. *Id.* at 369, 661 P.2d at 1275.

265. 270 N.W.2d 125 (N.D. 1978).

266. *Id.* at 132-33.

267. 134 Neb. 84, 277 N.W. 762 (1938). *See also supra* notes 141-49 and accompanying text.

268. *Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978). North Dakota had the sixth lowest malpractice rates in the nation at the time. *Id.*

269. *Id.* at 135-36.

270. 672 S.W.2d 296 (Tex. Ct. App. 1984), *aff'd on other grounds*, 714 S.W.2d 310 (Tex. 1986).

tion analysis, relying on the language from *Arneson* quoted above.<sup>271</sup>

A second approach to heightened scrutiny is illustrated in *American Bank & Trust Co. v. Community Hospital*.<sup>272</sup> In *American Bank* the majority noted that "the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing that those facts have ceased to exist."<sup>273</sup> This reasoning was followed with a finding that the crisis of 1974-75 was not caused by increases in the frequency or amount of judgments, but by losses suffered by insurers in stock market investments.<sup>274</sup>

The court in *Sibley v. Board of Supervisors*<sup>275</sup> took an entirely different approach to heightened scrutiny. The court initially upheld a maximum damage limitation of \$500,000 against due process and equal protection challenges. The *Sibley* court rejected these constitutional challenges on first hearing, stating that "[t]he right of malpractice claimants to sue for damages caused them by medical professionals does not involve a fundamental constitution [sic] right and, as such, is tested only by the lesser standard of rational basis."<sup>276</sup>

On rehearing,<sup>277</sup> the *Sibley* court vacated its earlier decision.<sup>278</sup> The main reason for the change was the court's decision to reject three-tiered scrutiny as a model for state equal protection. "Its rigidity forces courts to begin the decision-making process by pigeon holing a case in a particular category. . . . The federal three [tiered] system is in disarray and has failed to provide a theoretically sound framework for constitutional adjudication."<sup>279</sup>

Finally, the court equated the maximum damage limitations to discrimination on the basis of physical condition, stating that "[t]he law on its face is designed to impose different burdens on different classes of people according to the magnitude of damage to their physical condition."<sup>280</sup> Because the Louisiana State Constitution forbids discrimination on the basis of physical condition, the court remanded for a determination of constitutionality on this basis.

Under a heightened scrutiny test, *Graley v. Satayatham*<sup>281</sup> struck a collateral source rule abrogation that applied only to medical malpractice cases. Again, the court related legislative purpose to legislative

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271. *Id.* at 298 (quoting *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1978)).

272. 660 P.2d 829, 190 Cal. Rptr. 371 (1983), *rev'd on reh'g*, 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984).

273. *Id.* at 838, 190 Cal. Rptr. at 380.

274. *Id.* at 839, 190 Cal. Rptr. at 381.

275. 462 So. 2d 149 (La. 1985), *rev'd on reh'g*, 477 So. 2d 1094 (La. 1985).

276. *Id.* at 157.

277. *Sibley v. Board of Supervisors*, 477 So. 2d 1094 (La. 1985).

278. *Id.* at 1106-07.

279. *Id.* at 1108.

280. *Id.* at 1110.

281. 74 Ohio Op. 2d 316, 343 N.E.2d 832 (C.P. County 1976).

means. "[A]ssuming a valid legislative purpose to enact laws relating to the problem of the public's health, this legislation may be counter-productive. . . . [T]he quality of health care may actually decline . . . relaxation of standards may occur with the public as the victim."<sup>282</sup>

### 5. *Nebraska Analysis*

This analysis must begin with *Prendergast v. Nelson*.<sup>283</sup> *Prendergast* was an early challenge to the constitutionality of the 1976 legislation. The legislation was sustained in a plurality opinion, with three judges holding the legislation constitutional, three dissenters holding the legislation unconstitutional, and one justice holding that the parties lacked standing.<sup>284</sup> Significantly, the two remaining members of the Nebraska Supreme Court of 1977 were both dissenters.

The *Prendergast* plaintiff raised equal protection claims. However, the classes asserted were: (1) victims of malpractice and (2) other tort victims. The court held that, for these classes, the Legislature was "pointing up a crisis in the area of public health and welfare, and using the police power of the state to effect a solution."<sup>285</sup> Further, the court noted, "we have no reason to question the need for the legislation. . . . At the time of enactment of the act in question, there was an imminent danger that a drastic curtailment in the availability of health care services could occur in this state."<sup>286</sup>

If *Prendergast* is overruled on equal protection or due process grounds, it must be on one of three bases. The right itself may be elevated, the class may be declared suspect, or the legislative purpose may be questioned.

In support of elevating the right, it should be noted that if the open courts clause does not itself render maximum damage limitations unconstitutional, it nonetheless shows that the right to be made whole always has been considered important. Further evidence of this right's importance, inferred from the fact that, since 1913, questions concerning the extent of negligence have been carefully guarded as being for the jury only. In the context of contributory negligence, "all questions of negligence . . . and contributory negligence shall be for the jury."<sup>287</sup> The motivation apparently was to protect recovery in cases involving railroad injuries. A parallel section provides that assumption of the risk shall not be a bar if the "railroad company or its

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282. *Id.* at 320, 343 N.E.2d at 837-38.

283. 199 Neb. 97, 225 N.W.2d 657 (1977).

284. The decision is not as close as it appears. Under a unique provision of the Nebraska Constitution, a majority of five is required to strike an act of the Legislature on constitutional grounds. NEB. CONST. art. V, § 2.

285. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657, 667 (1977).

286. *Id.* at 114, 256 N.W.2d at 669.

287. NEB. REV. STAT. § 25-21,185 (1985).



agents, servants or employees have been guilty of negligence.”<sup>288</sup> Finally, since 1867, Nebraska law has held that “[w]henver damages are recoverable, the plaintiff may claim and recover any rate of damages to which he may be entitled for the cause of action established.”<sup>289</sup>

Whatever else can be said, it is clear that the right to recover damages has been accorded special protection in Nebraska history. In addition, those with actual damages of over \$1 million and the majority of those with noneconomic damages of over \$250,000 most probably will be members of a class of disabled citizens. The class itself is recognized and receives protection under many aspects of Nebraska law. For example, cities and villages are given the power to define, regulate, and suppress discrimination on the basis of disability in the areas of employment, public accommodation, and housing. When one considers that the statute will prevent individuals who become handicapped as the result of a tort from achieving full recovery, an invidious discrimination may be seen. One source notes that of the 1,642 tort awards of over \$1 million (from a nation of 240 million) which have ever been awarded, almost two-thirds of the recipients suffered permanent paralysis, brain damage, amputations, or death.<sup>290</sup>

If some sort of heightened scrutiny is invoked, the means still must be tested against the purposes of the legislation. Maximum limits on damages do not improve the quality of health care, but may in fact promote the availability of low cost health care by reducing charges to be passed through to patients. The link is weak, in that there is no guarantee insurers will lower premiums in response. Further, there is no guarantee lowered premiums will mean lowered costs to patients. The requirement of passing through multiple nexus—law to rate, rate to provider, and provider to public—makes the question a close one under intermediate scrutiny. The relationship of the collateral source elimination and modification of joint and several liability is even more tenuous. However, both of these measures could be viewed as cost pooling and risk spreading.

If strict scrutiny is invoked, as in *White*,<sup>291</sup> the bulk of the legislation fails. Whatever the least restrictive means of achieving these objectives, it is not to shift the burden to the few who are injured.<sup>292</sup>

Finally, as the *Prendergast* court noted, it had no need to question

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288. *Id.* § 25-21,184. The act is questionable as a special law.

289. *Id.* § 18-1725 (1983).

290. Glaberson & Farrell, *The Explosion in Liability Lawsuits is Nothing But a Myth*, BUSINESS WEEK, Apr. 21, 1986, at 24-25, quoted in Nebraska Ass'n of Trial Att'ys, *The Insurance "Crisis"?: A Nebraska Perspective*, at Appendix B.

291. *White v. Montana*, 203 Mont. 363, 661 P.2d 1272 (1983). See *supra* notes 263-64 and accompanying text.

292. The idea of requiring insurers to maintain a high percentage of gains from successful investment years in reserve for long periods as a hedge against bad years comes to mind.

the necessity of the legislation in 1976. However, this may be untrue in 1987. The 1976 legislation, and by implication the 1987 legislation, could be viewed as being premised on a certain set of facts—the existence of an “insurance crisis” and the withdrawal of providers from the field. The Court in *First Trust Co v. Smith*<sup>293</sup> judicially noticed the existence of federal legislation that terminated the “crisis” of farmers unable to recover the land’s value:

[L]egislation expressly by its terms based upon the existence of a definite emergency therein declared, or other state of facts to uphold it, may never possess validity if an obvious and vital mistake has occurred in the truth of the declaration . . . or may cease to operate if the emergency ceases or the facts change.<sup>294</sup>

Similarly, the legalization of risk pooling among physicians and hospitals under the Nebraska Hospital and Physicians Mutual Association Insurance Act<sup>295</sup> may have terminated the “insurance crisis.” If this is so, continued discrimination is unnecessary and raises new constitutional issues.

The facts indeed support the conclusion that whatever the situation was in 1976, no insurance crisis exists in Nebraska today. It is to these considerations that we now turn.

#### IV. POLICY ANALYSIS

If there is an “insurance crisis” in Nebraska, it cannot be seen from looking at the books of insurers. Nebraska’s thirty-five liability insurers recorded net earnings of \$101.3 million in 1983, \$119.9 million in 1984, and \$309.3 million in 1985.<sup>296</sup> Further, the profits of Nebraska insurers, from 1976 to 1985, *exceeded the national average in all lines*

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293. 134 Neb. 84, 277 N.W. 762 (1938). See *supra* notes 141-49 and accompanying text.

294. *First Trust Co. v. Smith*, 134 Neb. 84, 94-95, 277 N.W. 762, 768 (1938).

295. NEB. REV. STAT. §§ 44-2901 to -2918 (1984).

296. Kelley, *No State Crisis is Seen in Liability Insurance*, Lincoln Journal-Star, Aug. 10, 1986, at 1A, col. 4.

of insurance.<sup>297</sup> For medical malpractice insurance during the same years, the percentage of return on net worth was over four times the

297. All Lines Property/Casualty Insurance			
Year	Earned Premium	Operating Profit	Rate of Return on Net Worth
1976	\$417,000,000	9.1%	23%
1977	\$492,000,000	11.2%	27%
1978	\$553,000,000	3.9%	13%
1979	\$613,000,000	7.0%	20%
1980	\$654,000,000	-8.2%	-10%
1981	\$657,000,000	6.7%	20%
1982	\$717,000,000	7.5%	23%
1983	\$731,000,000	9.0%	26%
1984	\$789,000,000	4.5%	18%
1985	\$872,000,000	6.5%	22%
		Nebraska Average - 18%	
		National Average - 11%	

Other Liability Insurance  
(excluding medical malpractice)

Year	Earned Premium	Operating Profit	Rate of Return on Net Worth
1976	\$31,000,000	12.7%	30%
1977	\$41,000,000	24.6%	54%
1978	\$51,000,000	16.7%	39%
1979	\$54,000,000	14.0%	34%
1980	\$50,000,000	26.5%	60%
1981	\$46,000,000	15.9%	39%
1982	\$40,000,000	13.2%	34%
1983	\$44,000,000	8.5%	25%
1984	\$49,000,000	0.3%	9%
1985	\$70,000,000	-5.0%	-1%
		Nebraska Average - 32%	
		National Average - 8%	

NATIONAL ASS'N OF INSURANCE COMMISSIONERS, PROFITABILITY BY LINE, BY STATE quoted in Nebr. Ass'n of Trial Atty's, *The Insurance "Crisis"?: A Nebraska Perspective*, ch.2, at 2-3.

national average.<sup>298</sup>

The health of Nebraska insurers also can be gauged by examining the ratio of their surplus to premium risks. While the national average for insurers was a ratio of 1.9, Nebraska insurers weighed in at a conservative 2.6. "This means that basically the property and casualty industry has the capacity to handle most risk situations. . . . The companies can't seem to decide what special coverage to write."<sup>299</sup>

Moreover, the actual rates paid by Nebraska physicians for malpractice insurance are relatively low. For \$1 million of coverage, the typical family practitioner will pay around \$2,400 to a primary carrier and around \$1,200 to the state excess pool.<sup>300</sup> An obstetrician/gynecologist specialist may pay as much as \$20,000 to \$30,000 to a primary carrier and \$10,000 to \$15,000 to the excess pool, and an anesthesiologist may pay around \$6,000 less. The highest figure paid by a hospital was around \$220,000 to a primary carrier and \$110,000 to the state excess fund.<sup>301</sup>

The conclusions of a committee formed by the attorney generals of six states are relevant to the Nebraska situation. Their report examined four underlying premises of tort reform and found each one to be inaccurate. The attorney generals found that overall the industry was not in a poor financial condition, but on the contrary, it was profiting. In addition, they found no drastic increase in the size or number of liability claims. Finally, they found the crisis was not caused by the civil justice system and tort reform would not prevent a similar crisis

298. Medical Malpractice Insurance			
Year	Earned Premium	Operating Profit	Rate of Return on Net Worth
1976	\$7,000,000	41.2%	87%
1977	\$8,000,000	46.9%	99%
1978	\$7,000,000	39.9%	85%
1979	\$5,000,000	37.4%	71%
1980	\$5,000,000	31.5%	70%
1981	\$5,000,000	52.1%	111%
1982	\$6,000,000	42.0%	92%
1983	\$6,000,000	17.7%	43%
1984	\$7,000,000	24.6%	58%
1985	\$9,000,000	24.9%	59%
			Nebraska Average 78%
			National Average 19%

*Id.*

299. Kelly, *No State Crisis is Seen in Liability Insurance*, Lincoln Journal-Star, Aug. 10, 1986, at 4A, col. 2 (statement of Don Deal, property and casualty supervisor for the Nebraska Insurance Department).

300. Interview, *supra* note 74.

301. *Id.*

from occurring in the future.<sup>302</sup>

Significantly, there is every reason to believe the crisis was asserted in something less than good faith. Consumer Reports refers to the crisis as "manufactured" and "orchestrated." "In June 1985, John Byrne, then chairman of the board of Geico, a major insurance company, told the Casualty Actuaries of New York that 'the insurance companies should quit covering doctors, chemical manufacturers, and corporate officers . . . and let pressure for [tort] reform build in the courts and the state legislatures.'"<sup>303</sup>

The magazine recommended non-insurer risk pooling, tougher price regulation, and repeal of the McCarran-Ferguson antitrust exemption for insurers.

The insurance industry itself admitted manipulating the availability of certain lines for its own purposes. The Insurance Information Institute asserted one reason many of its members were refusing to insure nurse-midwives is "they are trying to change the widely held perception of an insurance crisis to a perception of a lawsuit crisis."<sup>304</sup>

Another source document, an insurance industry press release, claimed a \$5.5 billion loss in 1985. When challenged by Ralph Nader, the industry "amended" its figures to show a \$1.7 billion gain.<sup>305</sup>

To the extent an insurance crisis does exist, it is the result of insurance industry price wars, brought about by cycles in interest rates. Insurance companies have two sources of income—the premium dollar and the return on investment of the premium dollar. "When interest rates are high, insurance companies try to gain as many customers as possible, to bring in the premium dollars they want to invest. In the early 1980s, when interest rates topped twenty percent, insurance companies slashed premiums to sell as many policies as they could."<sup>306</sup>

Various figures within the insurance industry confirm the investment cycle created the current crisis. For example, Maurice Greenberg, president of the American International Group, recently stated that price cutting in the early 1980s "to the point of absurdity" was the

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302. National Association of Attorneys General, *An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance*, prepared by the Nat'l Ass'n of Att'ys Gen., Ad Hoc Comm. on Insurance (chaired by Francis X. Bellotti, Att'y Gen'l of Mass.) May 1986, noted in Schroeter & Rutzick, "Tort Reform"—*Being an Insurance Company Means Never Having to Say You're Sorry*, 22 GONZ. L. REV. 31, 34 (1986).

303. *The Manufactured Crisis*, 51 CONSUMER REPS. 544, 545 (1986).

304. Hunter, *The Insurance Industry is to Blame*, Washington Post, April 13, 1986, at C7, col. 1, (quoted in Nebr. Ass'n of Trial Atty's, *The Insurance "Crisis"?: A Nebraska Perspective*, at Appendix I).

305. Nebr. Ass'n of Trial Atty's, *The Insurance "Crisis"?: A Nebraska Perspective*, at Appendix L.

306. *The Manufactured Crisis*, 51 CONSUMER REPS. 544 (1986).

cause of the current crisis.<sup>307</sup> "Greenburg told an industry conference that if insurers had not cut prices but had merely held them constant there would not be 'all this hullabaloo' about the tort system."<sup>308</sup> Sean Mooney, Senior Vice-President of the Insurance Information Institute, stated "[t]he fact that premiums are going up at high rates is purely due to the cycle."<sup>309</sup> The cycle can be traced for at least 60 years.<sup>310</sup>

The Nebraska Department of Insurance provided reasons to believe the Nebraska "crisis" was the result of poor management by Nebraska insurers. "Every six or seven years we have a cycle in which intense competition among property and casualty insurers results in rates being set too low to cover claims. The insurers compete by undercharging."<sup>311</sup>

At least one state has recognized the true source of the insurance "crisis" and has enacted appropriate legislation. New York has limited both upward and downward variations in premiums that may be charged without prior approval:

The superintendent shall by regulation establish annual limitations upon rate level increases or decreases which may take effect without prior approval with respect to a market. The regulation shall be designed to restore and promote stability in such markets. Upon a determination made that, as to a particular market, competition is either sufficient to assure that rates will not be excessive or that such market is conducted in a manner not resulting in inadequate rates, not destructive of competition or detrimental to the solvency of insurers, the superintendent shall exempt such market from the limitations set forth in such regulation.<sup>312</sup>

The Act further requires insurers to account for the effects of any tort reform legislation, requiring the insurer to modify its rate filings to "reflect the likely reductive cost effects reasonably attributable to any newly enacted statutory provisions of the civil practice law and rules, court of claims act and not-for-profit corporation law."<sup>313</sup>

Again, the solution for the crisis would seem to be more regulation of insurers. Since the rise in premiums occurs during years when investments have become less profitable, an additional solution might be to require that investment profits be retained for a greater period of

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307. Hunter, *supra* note 304.

308. *Id.*

309. *The Manufactured Crisis*, 51 CONSUMER REP. 544, 545 (1986).

310. "In cycles that can be traced for 60 years, insurers have cut their premiums when investment rates are high, to undercut competition. Often rates are set too low to cover claims. Premiums are then increased when interest rates are high and investment income is low." Kelly, *Expert Says Insurance Industry Needs Reform*, Lincoln Journal-Star, Oct. 10, 1986, at 14, col. 2.

311. Kelly, *No State Crisis is Seen in Liability Insurance*, Lincoln Journal-Star, Aug. 10, 1986, at 1A, col. 4 (quoting Don Deal, the property and casualty supervisor at the Nebraska Insurance Department).

312. N.Y. INS. LAW § 2344(b) (McKinney Supp. 1988).

313. *Id.* § 2344(g)(1).

time as a hedge against bad years, rather than paid out as dividends as is the current practice.

## V. CONCLUSION

Two events, separate in time and space.

The first is in the future. Susan Von Stetina lives on in a hospital room in Florida, only partially capable of understanding the true nature of the misfortune that has befallen her. Somewhere, in Nebraska, her counterpart walks, alive and uninjured. What can happen will happen. The injury will occur and a horribly maimed plaintiff will come forward.

The second event is in the past. It is 1937. To describe the economy as poor is a gross understatement; it is catastrophic. Land was worth ruinously low sums, and it had been financed at high sums. Lenders wanted their money or the land back. Farmers wanted their homes, their livelihood, and they feared a future of being homeless and unemployed. The Legislature protected them, staying the foreclosures for several years. The lenders sought relief; the Supreme Court was pressed to declare the status of the relief law. The question could not be avoided. The Nebraska Supreme Court gave the only answer the constitution allowed it to give:

A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed. . . . Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors. . . . The necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced, by temporary excitements and passions among the people, to adopt oppressive enactments. What a court must do therefore, *is declare the law as written*.<sup>314</sup>

"All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."<sup>315</sup>

The Susan Von Stetina of tomorrow waits at the courthouse door.

*David G. Newkirk '87*

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314. *First Trust Co. v. Smith*, 134 Neb. 84, 103-04, 277 N.W. 762, 772 (1938).

315. NEB. CONST. art I, § 13.